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No. 83-353

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN SALORIO, ROBERT COE and
JOHN D. MCGARR, JR.,

Petitioners,

—v.—

SIDNEY GLASER, Director of the Division of Taxation,
Department of the Treasury of the State of New Jersey,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Max Gitter,
345 Park Avenue
New York, New York 10154
(212) 644-8000

Adrian M. Foley, Jr.,
Gateway I,
Newark, New Jersey 07102
(201) 643-2060

Counsel for Petitioners

Of Counsel:

Richard A. Rosen
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON,
A partnership including
professional corporations
New York, New York

Kevin J. Coakley,
CONNELL FOLEY & GEISER,
Newark, New Jersey

September 1, 1983

Question Presented

Whether affording only prospective effect to a judgment invalidating a taxing statute identical in purpose, structure, operation and effect to a statute previously declared unconstitutional by this Court undermines the principle of *stare decisis*, and signals to the states that even facially unconstitutional legislation can be used to raise revenue without any serious risk that funds so collected will ever have to be refunded.

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JOHN SALORIO, ROBERT COE and
JOHN D. MCGARR, JR.,

Petitioners,

—v.—

SIDNEY GLASER, Director of the Division of Taxation,
Department of the Treasury of the State of New Jersey,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Petitioners John Salorio, Robert Coe and John D. McGarr, Jr. respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey entered on June 8, 1983.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court, which is not yet officially reported, appears in Appendix A hereto at A1. The opinion of the court of first instance (New Jersey Superior Court, Chancery Division) appears in Appendix B hereto at A23. A prior opinion of the New Jersey Supreme Court, remanding the case to the Superior Court, Chancery Division, for findings of fact, is officially reported at 82 N.J. 482, 414 A.2d 943 (1980).

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on June 8, 1983. This petition was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Statutory and Constitutional Provisions Involved

New Jersey Emergency Transportation Tax Act (Commuter Income Tax), 54 *N.J. Stat. Ann.* §§ 8A-1-8A-57 (West Supp. 1983).

Reprinted in Appendix D to this Petition for Certiorari.

U.S. Const., Art. IV, § 2, cl. 1

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Statement of the Case

A. Preliminary Statement

Petitioners are citizens and residents of the State of New York who work or who have worked in the State of New Jersey, and who have therefore been subject to New Jersey's Commuter Income Tax, which falls exclusively on New Yorkers. Although the Commuter Income Tax is indistinguishable from the discriminatory commuter tax struck down under the Privileges and Immunities Clause in *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), petitioners were required to expend more than six years in the New Jersey State courts relitigating precisely the issue decided in *Austin*. Until the New Jersey Supreme Court finally held, in June 1983, that the Commuter Income Tax violates the Privileges and Immunities Clause, the State of New Jersey continued to collect the unconstitutional tax.

The New Jersey Supreme Court nevertheless applied its ruling prospectively only, and refused to award petitioners any refunds of taxes paid after the date of the *Austin* decision. By postponing the effective date of its decision to January 1, 1984, the Court permitted the State to reap a substantial windfall, and sanctioned its defiance of this Court's decree. If permitted to stand, this aspect of the judgment of the Court below will be a clear signal to state and local governments that the risks entailed by ignoring this Court's decisions are minimal. The states will conclude that even plainly unconstitutional statutes may be counted on to raise revenue until the judicial process ends and the legislation is invalidated.

This Court should therefore grant certiorari to protect the integrity of *stare decisis* in constitutional litigation.

B. New Jersey's Commuter Income Tax

Pursuant to the Commuter Income Tax, first enacted in 1961, New Jersey has taxed New York residents who derive income in or from the State of New Jersey at rates that range from 2% to 15% of taxable income. New Jersey residents, however, paid no income tax whatsoever on their income derived from New Jersey until 1976, and since that time have paid income taxes of 2% to 3%, under a separate tax called the New Jersey Gross Income Tax.[1]

While New Jersey residents are theoretically subject to the Commuter Income Tax,[2] only New York residents pay the tax

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1 New Yorkers working in New Jersey are subject to the Gross Income Tax as well as the Commuter Income Tax, and are required to pay whichever tax results in the higher levy.

2 By its terms, the Commuter Income Tax is imposed (a) upon residents of New Jersey on their income earned in another "critical area state" and (b) upon *all* income—including rents, capital gains, and so forth—derived from New Jersey by persons who are not residents of New Jersey but who reside in a "critical area state." 54 N.J. Stat. Ann. § 8A-2 (West Supp. 1983). A "critical area state" is one bordering on New Jersey as to which the State Highway Commissioner

in practice. The statute provides New Jersey residents working in New York with a credit against the Commuter Income Tax for income taxes which they pay to New York. 54 N.J. Stat. Ann. § 8A-16 (West Supp. 1983). Since New York's income tax is identical in rate with the Commuter Income Tax, New Jersey residents who work in New York pay income taxes to New York which necessarily equal the Commuter Income Tax; they therefore receive a full credit and pay no Commuter Income Tax to New Jersey. Thus, no New Jersey resident has ever paid a penny under this tax. Indeed, New Jersey residents have been exempted from filing returns for the Commuter Income Tax. 54 N.J. Stat. Ann. § 8A-19(b) (West Supp. 1983); [1980] 1 N.J. Tax Reporter (CCH) §§ 18-301, 305.

The New Jersey Commuter Income Tax on New York residents is, and has been since its inception, identical in all significant respects with the New York State income tax. For example, the rate table for the Commuter Income Tax is a carbon copy of the rate table for New York's income tax as set out in the New York statute books.[3] Not only are the tax rates and structures of the two taxes identical, but each time New York has amended its income tax statute in any significant respect, New Jersey has shortly thereafter enacted an identical change.

Significant to the analysis required by *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), New Jersey does not impose any tax which is payable by New Jersey citizens alone—all of New Jersey's other taxes are imposed upon residents and nonresidents alike.

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has certified that there exists a "critical transportation problem" relating to the commutation between New Jersey and the bordering state. 54 N.J. Stat. Ann. § 8A-5 (West Supp. 1983).

The only "critical area" which has ever been certified is the New York-New Jersey border. Therefore, residents of New York who work in New Jersey and New Jersey residents who work in New York are theoretically subject to the Commuter Income Tax.

3 Compare 1978 N.J. Sess. Laws, Ch. 131, with 59 New York Tax Law § 602 (McKinney 1982) and 1978 N.Y. Sess. Laws, Ch. 70.

The purported justification for the Commuter Income Tax is the burden that nonresident commuters allegedly place upon New Jersey's transportation facilities. But the tax has never been adjusted during its entire twenty year history to reflect any transportation needs or burdens; its rates are set solely to conform with New York's statute. Indeed, Governor Meyner, in his original message to the New Jersey legislature, candidly stated that the intent of the statute was to take advantage of tax credits granted by New York State's income tax scheme and divert tax revenues from New York. *See*, Day, *Taxing Interstate Commuters: A New Jersey Experiment Under The United States Constitution*, 18 Rutgers L. Rev. 1, 2 (1963).[4]

Moreover, imposition of the tax is not limited to New Yorkers who actually commute to New Jersey; rather, the tax is levied on *all* income derived by New Yorkers from New Jersey, including rents and capital gains, whether or not the New York resident ever sets foot in New Jersey. Yet neither Connecticut nor New Jersey residents who use the very same transportation facilities are taxed.

The New Jersey tax is identical in all significant respects to the discriminatory commuter tax invalidated by this Court in *Austin* v. *New Hampshire*, 420 U.S. 656 (1975).

—Each commuter income tax is a duplicate of the income tax imposed by the bordering state;

—Each was designed to, and has the effect of, taking advantage of tax credits granted by the bordering state in order to divert income tax revenues from that bordering state;

—Each is nominally imposed on residents and nonresidents, but, by means of credits or exemptions, in fact is imposed only on nonresidents;

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4 While the proceeds of the tax assertedly are kept in a special fund for transportation projects, 54 N.J. Stat. Ann. §§ 8A-20-23 (West Supp. 1983), transfers from that fund may be and have been made regularly to the State's General Fund and to the Property Tax Relief Fund. *See* 54 N.J. Stat. Ann. § 8A-121 (West Supp. 1983).

—Each taxing state requires employers to withhold portions of the nonresidents' income for payment of the commuter income tax;

—Each commuter income tax "falls exclusively on the income of nonresidents; and it is not offset even approximately by other taxes imposed upon residents alone." *Austin* v. *New Hampshire*, 420 U.S. at 665.[5]

This Court concluded that the New Hampshire tax could be upheld only if, looking to "the practical effect and operation" of the taxing scheme, "the nonresident was not treated more onerously than the resident in any particular, and in fact was called upon to make *no more than his ratable contribution to the support of the state government*." 420 U.S. at 664 (emphasis added).

Although New Hampshire attempted to argue that the tax did not discriminate at all between Maine and New Hampshire citizens, this Court ruled flatly that the New Hampshire tax could not be sustained under the principle of "substantial equality of treatment," because the "tax falls exclusively on the income of nonresidents; and it is not offset even approximately by other taxes imposed upon residents alone." 420 U.S. at 665.

The discriminatory effect of the New Jersey Commuter Income Tax is identical with that of the invalid New Hampshire tax. The New Jersey Commuter Income Tax falls only on nonresidents—in this case, only New Yorkers—and the tax on New York residents' income (up to 15% of taxable income) is not even approximately offset by taxes that New Jersey has imposed *only* upon its *own residents*.

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5 In this and other respects, the New Jersey Commuter Income Tax is worse than the New Hampshire tax invalidated in *Austin*. New Hampshire residents did pay some taxes to which nonresidents were not subjected. *See Austin v. New Hampshire*, 420 U.S. at 659 n. 3. Moreover, the maximum rate paid by Maine residents in *Austin* was 4%, whereas the Commuter Income Tax imposed on New Yorkers has ranged as high as 15%.

The State of New Jersey recognized that the constitutional fate of its statute was inextricably tied to that of the New Hampshire tax. Thus, New Jersey submitted an *amicus* brief to this Court in *Austin* (on behalf of New Hampshire) which conceded that the two states' commuter income tax schemes were "similar." *See* Amicus Curiae Brief of the Attorney General of the State of New Jersey at 3, *Austin* v. *New Hampshire*, 420 U.S. 656 (1975). The New Jersey Supreme Court has also stated that "[t]he mechanics of the [Commuter Income Tax] are strikingly similar to the invalidated New Hampshire tax." *Salorio* v. *Glaser*, 82 N.J. 482, 504 n.17, 414 A.2d 943, 953 n.17 (1980). And in evident recognition of the constitutional infir.nities of its tax in the wake of *Austin*, the proceeds of the tax were held separate for a period of at least two years pending the outcome of this challenge to the tax, and were disbursed only at the end of each fiscal year.

C. New Jersey's Evasion of this Court's Decree in *Austin*

Austin therefore clearly foreshadowed—indeed, compelled—a ruling that the Commuter Income Tax contravenes the Privileges and Immunities Clause. Yet New Jersey managed to stave off compliance with the teaching of this Court for more than six years, meanwhile collecting as much as $40 million each year from citizens of New York.

After substantial dilatory and frivolous motion practice,[6] which helped to delay the case for over a year before the merits could even be addressed, the State attempted to distinguish

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6 Thus, for example, the State (1) moved to dismiss the case for failure to exhaust administrative remedies—in the face of uniform authority holding that no exhaustion is necessary in a constitutional challenge to a statute; (2) moved to dismiss for failure to join New York State as a "real party in interest," even though New Jersey previously had argued—and this Court had held—that only individual citizens, and not the State of New York, had standing, *New York* v. *New Jersey*, 429 U.S. 810 (1976); and (3) moved to dismiss on the ground that plaintiffs lacked standing—on precisely the same argument raised and squarely rejected in *Austin* v. *New Hampshire*, 420 U.S. at 659-60 n. 4.

Austin on the ground that the tax is justified by the costs New Yorkers impose on New Jersey's transportation facilities. Yet such a justification must be meaningless as a matter of law. By definition, a nonresident who works in a neighboring state and thereby earns income can do so only by transporting himself there. This interstate commutation necessarily will impose some cost or "burden" upon the transportation facilities of the taxing state. *Austin* necessarily presented precisely the same problem, and therefore must be read to hold that the "transportation problem" created by the mere movement of residents of one state to work in a neighboring state cannot serve as a legitimate justification for a discriminatory tax. Otherwise, *Austin* would be a nullity.

And this "cost" justification was frivolous as a matter of fact as well. For not only had the tax been enacted and modified solely to capture income from New York, and in disregard of any transportation cost issues (*see* pp. 3-5, *supra*), but the State was unable to advance any evidence at the five day hearing on this matter that New Yorkers constituted the "peculiar source" of the alleged transportation problem, *Toomer* v. *Witsell*, 334 U.S. 385, 398 (1948); *Hicklin* v. *Orbeck*, 437 U.S. 518, 526-27 (1978), or that there was a "substantial relationship" between the burdens New Yorkers imposed on the transportation system and the discrimination practiced against them. *See Toomer* v. *Witsell*, 334 U.S. at 398-99. Indeed, how could it have done so? As the New Jersey Supreme Court noted, "New Jersey to New York commuters substantially outnumber those travelling from New York to New Jersey," and New Yorkers constitute a tiny fraction—2.9% in 1970 and 4.0% in 1980—of the total number of interstate and intrastate commuters using New Jersey's facilities. *See* Appendix A at A12.[7] New Yorkers thus travel ***against***

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7 Between 1962-1980, the tax generated $381 million from New Yorkers. Yet, even according to the State's own testimony, there was a gross disparity between the sums collected and the costs attributable to New York commuters. The New Jersey Supreme Court assumed without deciding that the State was correct that New Yorkers paid

the peak flow of traffic, which consists of New Jerseyans commuting to New York.

Recognizing that the tax could not be justified under *Austin* by reference to the additional costs New Yorkers impose on New Jersey's transportation facilities, the State essentially abandoned its attempt to defend the tax on this ground, and instead concocted a novel—and incoherent—"benefits" theory, which was ultimately, and properly, rejected by the New Jersey Supreme Court (Appendix A at A11). On this theory, New York commuters (like any other user of New Jersey transportation facilities) receive some theoretical total amount of "benefits" from travelling on New Jersey roads (such as reduced travel time and savings on tire wear); the dollar amount of such benefits is necessarily a multiple of the costs imposed by New Yorkers; and New York commuters may be taxed in an amount equivalent to these theoretical "benefits". But New Jersey taxes its *own* residents on the basis of costs it incurs, and not on benefits New Jerseyans enjoy; the State does not make a profit off its citizens. On the State's theory, however, since the dollar amount of benefits exceeds the dollar amount of transportation costs, New Jersey *can* make a profit, but only off New York commuters.[8]

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twice as much in taxes as the costs attributable to them, because the Court concluded that the Privileges and Immunities Clause was violated by a disparity of this magnitude. The record below demonstrates clearly, however, that the proceeds of the tax were actually between *nine* and *thirty* times higher than maximum state and local government transportation expenditures that could conceivably be attributed to New Yorkers. Indeed, New Yorkers' payments under New Jersey's gasoline tax alone more than covered their share of any state transportation costs.

8 In any event, the "benefits" test is purely tautological—a New Yorker's *share* of benefits is precisely the same as his *share* of costs; the State measured both on the basis of percentage of use of transportation facilities. New York commuters represent only about 1% of total usage of transport facilities, and yet their tax payments are many times more than 1% of total payments for transportation in New Jersey. As the trial court recognized, on the State's theory, New Yorkers must pay

In short, as was clear from the outset of this litigation, and as the New Jersey Supreme Court ultimately held, New Jersey's "transportation" justification for its discriminatory tax was a makeweight which could not withstand serious analysis. But by ruling that its decision voiding the Commuter Income Tax would be afforded prospective effect only, and that petitioners would not be awarded refunds of taxes paid to the State since *Austin*, the New Jersey Supreme Court rewarded the State for gambling that it would not be penalized for failing to comply with a controlling precedent of this Court.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT TO RESTRAIN THE INVOCATION OF THE PROSPECTIVITY DOCTRINE AS A DEVICE FOR AVOIDING *STARE DECISIS*, AND TO ENSURE THAT STATES DO NOT CONTINUE TO ENFORCE UNCONSTITUTIONAL REVENUE STATUTES BECAUSE OF A BELIEF THAT RETROSPECTIVE RELIEF WILL RARELY, IF EVER, BE AWARDED.

Before a rule of law can be afforded prospective effect only, it is well-settled that

> "[t]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed."

Chevron Oil Co. v. *Huson*, 404 U.S. 97, 106 (1971) (citations omitted). The justification for limiting prospectivity to cases that announce a new legal standard is that any other rule would vitiate the rule of *stare decisis* and undermine the role of this Court as the ultimate arbiter of questions of constitutional

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a dollar for each dollar of benefit, while New Jersey residents pay no more than 12-16 cents for the same dollar of benefit. (*See* Appendix B at A30.)

dimensions. Retrospective application of established legal principles through damage awards is what gives this Court some assurance that, by and large, its decisions will actually govern the behavior of persons in similar circumstances.[9] Such assurance is of particular significance because of the practical inability of the courts—and of this Court in particular—to provide review of every statute of dubious constitutional validity.

Vigilant monitoring by this Court is especially necessary when the doctrine of prospectivity, designed as a shield against unexpectedly harsh or unjust results when a new legal principle is announced, is instead invoked to avoid the impact of controlling precedent. Prospectivity then becomes a sword. It cuts off relief to which persons injured by a clearly unconstitutional statute are entitled, destroys incentives to challenge unconstitutional enactments, and removes the deterrent effect of damage awards on unconstitutional conduct. That, we submit, is what has happened in this case.

Once this Court had decided *Austin* v. *New Hampshire* in 1975, there was no reasonable basis for believing that the New Jersey Commuter Income Tax could pass constitutional muster. The tax should have been declared unconstitutional on its face in a summary proceeding. Rather than acknowledge that the *Austin* decision controlled, however, New Jersey continued to enforce its facially invalid statute while the litigation languished in the state court system for nearly six years.[10] And by

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9 As Professor Mishkin pointed out almost twenty years ago, retroactive application of holdings that can be "reasonably anticipated" helps insure that those who may be affected by such holdings will seek to conform, in advance, to expected standards. Mishkin, *The Supreme Court, 1964 Term-Foreword: The High Court, The Great Writ, and Due Process of Time and Law*, 79 Harv. L. Rev. 56, 72 (1965).

10 It should be pointed out that New Jersey is not the first state that has sought to retain the benefits of invalid tax legislation. Historians have documented numerous instances in which governments have collected taxes under clearly unlawful statutes. *See* O. Field, *The Effect of an Unconstitutional Statute* 318-320 (1935).

1980, when the New Jersey Supreme Court ruled that the *State* had the burden of proof, New Jersey could not possibly argue that it was relying on the presumed constitutionality of a legislative act. *Salorio* v. *Glaser*, 82 N.J. 482, 503-504, 414 A.2d 943, 953-54 (1980). Yet, New Jersey reaped as much as $40 million per year exclusively from New Yorkers, who had no voice in the legislative affairs of New Jersey and whose interests were entirely unrepresented there.[11]

By permitting New Jersey to retain the tax revenues it obtained from New Yorkers and postponing the effectiveness of its decision to strike down the statute until 1984, the New Jersey Supreme Court's judgment tells the states that it is to their advantage to enact revenue statutes without regard to their constitutionality. Legislatures can be secure in the knowledge that, even if their unconstitutional laws are ultimately

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11 Granting the writ is particularly appropriate in this case because *Salorio* concerns a state tax that contravenes the Privileges and Immunities Clause. Non-residents of a state who are subject to a discriminatory tax can generally challenge its constitutionality only in state court. *See* Tax Injunction Act, 28 U.S.C. § 1341 (1976). State court judges, however, are understandably reluctant to void a tax that constitutes a substantial source of revenue for the state. The original New Jersey trial judge in this case, for instance, candidly stated on a number of occasions that he was struggling for a way to uphold the tax, despite *Austin*. He said, for example: "[I]f I could find a way to end it or to avoid *Austin*, I surely would sustain this tax. . . ." Transcript of Proceedings, *Salorio* v. *Glaser*, No. C-3628-76 (N.J. Super. Ct. Ch. Div. Feb. 23, 1978) at 16.

The reluctance to void an unconstitutional tax may extend to a reluctance to apply any such decision retroactively. As this Court recognized in *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 n. 2 (1973), however, constitutional interests cannot be ignored in deciding whether to attach retrospective effect to a constitutional decision. This Court should take this opportunity to reemphasize the importance of the values embodied in the Privileges and Immunities Clause and the appropriateness of securing these values by awarding damages for a clear violation of the principles of *Austin*. Where a state's financal self-interest is implicated, this Court has been particularly vigilant in protecting constitutional principles. *See United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25-26 (1977).

invalidated, the states will be able to retain any revenues they received in the interim.

Such a misconception will affect more than economic interests. It will impede the operation of the Privileges and Immunities Clause itself. *See*, *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106-107 ("we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation"). Even the temporary enforcement of comparable legislation will have a substantially harmful impact on the ability of thousands of persons like petitioners to travel and pursue their occupations in neighboring states free from discriminatory treatment. It will also disrupt the structural integrity of our federal system by encouraging the passage of retaliatory legislation by the home states of commuters. *See Austin* v. *New Hampshire*, 420 U.S. at 662. Retrospective application of the *Salorio* decision to require refunds of taxes paid since 1975, when *Austin* was decided, or since 1980, when the New Jersey Supreme Court placed on the State the burden of proof to justify the tax, will substantially advance the underlying purposes of the Privileges and Immunities Clause.

The New Jersey Supreme Court's justification for declining to give its ruling retrospective effect was that it was announcing "a new rule of law" and that the State had reasonably relied on the revenues derived from the tax until such time as it was declared invalid (Appendix A at A17-A18). To be sure, this Court has, on several occasions, held that prospective application of a decision was appropriate when an issue of first impression had been decided. *See*, *e.g.*, *Lemon* v. *Kurtzman*, 411 U.S. 192, 206 (1973).

But this is not such a case. *Austin* v. *New Hampshire* not only foreshadowed, but compelled, the invalidation of the Commuter Income Tax. As this Court noted recently in *United States* v. *Johnson*, 457 U.S. 537, 549 (1982):

> "when a decision of this Court merely has applied settled precedents to new and different factual situations, no real

> question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."

Under such circumstances, this Court simply will not hear it argued that reliance has been placed on the unconstitutional statute; such a "rule would mean that every such unconstitutional statute, like every dog, gets one bite, if anyone has relied on the statute to his detriment." *New York* v. *Cathedral Academy*, 434 U.S. 125, 130 (1977).

To permit the prospective aspect of the judgment below to stand would, in a very direct way, undermine the importance of *stare decisis* in constitutional litigation, and remove a significant constraint on the states' willingness to enact revenue legislation that impinges on clearly articulated and entrenched constitutional values. If the State of New Jersey is permitted to retain the tax revenues it collected in defiance of this Court's decision in *Austin*, the carefully delimited doctrine of prospectivity will have engulfed the general principle that settled rules of law should be afforded retrospective effect.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the prospective aspect of the judgment of the Supreme Court of New Jersey.

September 2, 1983

Respectfully submitted,

Max Gitter
Adrian M. Foley, Jr.
Counsel for Petitioners

Of Counsel:

Richard A. Rosen
Kevin J. Coakley

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345 Park Avenue
New York, New York 10154
(212) 644-8000

Adrian M. Foley, Jr.,
Gateway I,
Newark, New Jersey 07102
(201) 643-2060

Counsel for Petitioners

Of Counsel:

Richard A. Rosen
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON,
A partnership including
professional corporations
New York, New York

Kevin J. Coakley,
CONNELL FOLEY & GEISER,
Newark, New Jersey

September 1, 1983

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APPENDIX A

Opinion of the Supreme Court of New Jersey, dated June 8, 1983

SUPREME COURT OF NEW JERSEY

A-33 September Term 1982

JOHN SALORIO, ROBERT COE and JOHN D. MCGARR, JR.,

Plaintiffs-Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Defendant-Respondent.

Argued December 6, 1982—Decided June 8, 1983

On certification to the Superior Court, Chancery Division.

MAX GITTER, a member of the New York bar, argued the cause for appellants (*Connell, Foley & Geiser*, attorneys; *Mr. Gitter, Suzanne Last Stone*, a member of the New York bar, *Adrian M. Foley, Jr.*, and *Kevin J. Coakley*, of counsel).

MICHAEL R. COLE, Assistant Attorney General, argued the cause for respondent (*Irwin I. Kimmelman*, Attorney General of New Jer-

sey, attorney; *Mr. Cole*, *Mary R. Hamill* and *Andrea M. Silkowitz*, Deputy Attorneys General, on the briefs).

The opinion of the Court was delivered by SCHREIBER, J.

This case concerns the constitutionality of the Emergency Transportation Tax Act (ETT), *N.J.S.A.* 54:8A-1 to -57. Plaintiffs are three New York residents who commute or have commuted from their homes in New York to work in New Jersey. Claiming that the ETT, an obligation levied on the New Jersey-derived income of only New York residents, discriminates unconstitutionally against them, plaintiffs seek declaratory and injunctive relief in addition to damages. This cause was initially decided by the trial court after a summary proceeding without testimony pursuant to *R.* 4:67 and was certified for direct appeal to this Court. 81 *N.J.* 269 (1979). In *Salorio v. Glaser (Salorio I)*, 82 *N.J.* 482, *cert.* denied, 449 *U.S.* 874, 101 *S.Ct.* 215, 66 *L.Ed.*2d 94 (1980), we held that the ETT does not violate the Equal Protection Clause of the fourteenth amendment, *U.S. Const.*, amend. XIV, § 1. We remanded for plenary hearing to make a complete record so as to enable the trial court to determine whether the ETT contravenes the Privileges and Immunities Clause of the federal constitution, *U.S. Const.*, art. IV, § 2, cl. 1. Today, we review the proceedings that followed our remand.

I

The facts were fully described by Justice Pashman in *Salorio I.* 82 *N.J.* at 488-90. A summary is sufficient for an understanding of this opinion. New Jersey has developed, constructed and maintained commuter transportation facilities so that residents of New Jersey and New York residing in one

state and working in the other can move more readily between these states. State expenditures for this purpose have been and are financed in part by general revenue taxes and in part by taxes collected specifically to defray the cost of transportation programs. One revenue source earmarked for these state expenditures is the Emergency Transportation Tax (ETT), first enacted in 1961. *L.*1961, *c.*32.[1]

Under the existing scheme New York residents who commute to work in New Jersey must pay the higher of the New Jersey Gross Income Tax, *N.J.S.A.* 54A:1-1 to :10-12, or the ETT, each of which is imposed only on income earned in New Jersey. If the ETT obligation is the greater of the two and is therefore imposed, that part of the ETT revenues equivalent to the New Jersey Gross Income Tax is paid into the Property Tax Relief Fund. *N.J.S.A.* 54:8A-121; *N.J.S.A.* 54A:9-25.[2] The balance of the ETT revenues is deposited in a special "Transportation Fund," *N.J.S.A.* 54:8A-120, identified for projects and programs to meet transportation problems.[3] *N.J.S.A.* 54:8A-20(a).

In *Salorio I*, we noted that under the Privileges and Immunities Clause[4] residents and nonresidents are to be treated with "substantial equality," 82 *N.J.* at 501, and that the ETT tax, which falls only on New York residents, involves a constitutionally-protected right to pursue an occupation outside their home state. *Id.* We stated that a statute that causes disparate treatment of nonresidents is invalid under the Privileges and Immunities Clause, unless (1) the State can prove that nonresi-

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1 When *Salorio I* was decided, the ETT act was to expire on December 31, 1980. *See L.*1969, *c.*36; 82 *N.J.* at 500. The Legislature has since extended its life through December 31, 1990. *See L.* 1980, *c.* 89, § 1; *N.J.S.A.* 54:8A-57.

2 Prior to the 1976 Gross Income Tax Act, the entire ETT liability was paid into the Transportation Fund.

3 If monies in the Transportation Fund are misapplied, a refund or credit must be given to the taxpayer. *N.J.S.A.* 54:8A-22.

4 The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. [*U.S. Const.*, art. IV, § 2)

dents are a "peculiar source" of the evil at which the statute is aimed and (2) the singular treatment of nonresidents bears a "substantial relationship" to the particular evil that nonresidents are said to present. *Id.* at 503-04. We agreed with the State that costs and expenses related to mass transportation due to the almost daily movement of large numbers of people from New York to New Jersey served as a valid independent justification for a commuter tax on nonresidents. *Id.* at 504-05. On the record before us in *Salorio I*, however, we could not identify the extent of the "peculiar source" of the transportation problem attributable to the New York commuter or the "substantial relationship" that the tax levied on the New York commuter bore to costs expended in attempting to solve that problem.

With regard to "peculiar source," we explained:

> While commuters living in New York need not be the sole cause of New Jersey's transportation crisis to justify discriminatory treatment, more than merely their identification is required. The State's burden of showing that non-residents constitute a "peculiar source" of an evil would be stripped of meaning if that obligation could be discharged simply by referring to a problem to which non-residents make but a small contribution. [*Id.* at 505 (footnote omitted)]

The "substantial relationship" test also required particular proof:

> Imposition of the ETT cannot be justified if it appears that the tax burden on New York residents is substantially disproportionate to their burden upon New Jersey's transportation facilities.
>
> This is not to say that non-resident commuters cannot be charged for any benefits resulting from New Jersey's subsidization of commuter transportation facilities and expenditures for highway construction and maintenance in northern New Jersey. The Constitution does not entitle nonresident commuters to a "free ride." The State may

> exact from them a fair share of the cost of adequate transportation facilities without violating the Privileges and Immunities Clause.
>
> The record discloses that expenditures for highway construction and maintenance in northern New Jersey amounted to $910 million during the years 1970 through 1977. Since none of these funds came from emergency transportation taxes, non-residents apparently did not contribute to the cost of providing these vital transportation facilities. The expenditure figures introduced also indicate, however, that ETT funds have supplied a very substantial portion of state expenditures for bus and rail facilities. While non-resident use of such facilities constitutes a very small percentage of total patronage, we recognize that a strict percentage analysis is not required for each separate type of commuter transportation facility. [*Id.* at 505-06 (footnotes omitted)]

The State was thus required to produce evidence to determine whether the tax imposed on New York commuters is commensurate with the share of the expenditures related to the transportation problem they cause. *See id.* at 517.

After a five-day hearing pursuant to our remand in *Salorio I*, the trial court found the burden of the ETT on New York commuters to be "substantially commensurate with the benefit they derive from the use of New Jersey's transportation facilities." Accordingly, the trial court held that the ETT does not violate the Privileges and Immunities Clause. We certified the case for direct review on our own motion. 91 *N.J.* 182 (1982).

II

The Supreme Court has frequently observed that the principal purpose of the Privileges and Immunities Clause of article IV, section 2, of the Constitution is "to help fuse into one Nation a collection of independent, sovereign States. It was designed to ensure to a citizen of State A who ventures into State B the same privileges which the citizens of State B

enjoy."[5] *Toomer v. Witsell*, 334 *U.S.* 385, 395, 68 *S.Ct.* 1156, 92 *L.Ed.* 1460, 1471 (1948). The Clause's predecessor, which had the same intent, is found in the Articles of Confederation, art. IV, par. 1. Thus, protection is afforded the nonresident who lacked the right to vote and who was vulnerable to local bias or insensitivity. J. Ely, *Democracy and Distrust* 83 (1980); Simson, "Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV," 128 *U. Pa. L. Rev.* 379, 384-86 (1979). At the heart of the Clause "is the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation. . . ." *Ward v. Maryland*, 79 *U.S.* (12 Wall.) 418, 430, 20 *L.Ed.* 449, 452 (1871). It forbids one state from unduly discriminating against citizens of another state in favor of its own. Excepted from this principle is the situation in which the discrimination against the nonresident relates to conduct or activities that are not "basic to the maintenance or well-being of the Union." *Baldwin v. Fish & Game Comm'n*, 436 *U.S.* 371, 388, 98 *S.Ct.* 1852, 56 *L.Ed.* 354, 368 (1978). The theory behind this exception is that state discrimination concerning non-fundamental activities does not "frustrate the purposes of the formation of the Union." *Id.* at 388. For a criticism of this view, see Varat, "State 'Citizenship' and Interstate Equality," 48 *U. Chi. L. Rev.* 487, 511 (1981), contending that the purpose of the Clause was to promote political and social cohesion as well as economic interrelationship.

In analyzing a statute challenged under the Privileges and Immunities Clause, it is necessary to determine if the statute discriminates against nonresidents, to identify the nature and extent of that discrimination, and to decide whether the discrimination is reasonably related to legitimate purposes that

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5 "Citizens" has been interpreted to be equivalent to residents, *Austin v. New Hampshire*, 420 *U.S.* 656, 662 n.8, 95 *S.Ct.* 1191, ___ n.8, 43 *L.Ed.*2d 530, 536 n.8 (1975), but not to include corporations, *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 *U.S.* 648, 656, 101 *S.Ct.* 2070, ___, 68 *L.Ed.*2d 514, 522-23 (1981); *Paul v. Virginia*, 75 *U.S.* (8 Wall.) 168, 19 *L.Ed.* 357 (1869).

are the bases for the discrimination. If there is no substantial reason for the discrimination, the clause is violated and the inquiry is at an end. *Austin v. New Hampshire*, 420 *U.S.* 656, 95 *S.Ct.* 1191, 43 *L.Ed.*2d 530 (1975). If there are one or more substantial reasons for the discrimination, then the discrimination must bear a close relationshp to them. Put another way, the nonresident must "constitute a peculiar source of the evil at which the statute is aimed," *Hicklin v. Orbeck*, 437 *U.S.* 518, 525-26, 98 *S.Ct.* 2482, 2488, 57 *L.Ed.*2d 397, 404 (1978) (quoting *Toomer v. Witsell*, 334 *U.S.* at 398, 68 *S.Ct.* at 1163, 92 *L.Ed.* at 1472), and there must be a "substantial relationship" between the evil and the discrimination practiced upon them, *id.* at 527, 98 *S.Ct.* at ____, 57 *L.Ed.*2d at 405; *see also Mullaney v. Anderson*, 342 *U.S.* 415, 418, 72 *S.Ct.* 428, 96 *L.Ed.* 458, 462 (1952).

When a state is exercising its taxing power, there should be substantial equality of treatment, unless a justification is advanced supportive of the discrimination. Such justifications must be linked to some evil or problem caused by the nonresident, and, if linked, the revenue derived from the tax should bear a substantial relationship to the cost of amelioration of the evil or the solution of the problem. The correlation need not be perfect and a state has "considerable leeway in analyzing local evils and in prescribing appropriate cures." *Toomer v. Witsell*, 334 *U.S.* at 396, 68 *S.Ct.* at ____, 92 *L.Ed.* at 1471; *see, e.g., Shaffer v. Carter*, 252 *U.S.* 37, 56-57, 40 *S.Ct.* 221, ____, 64 *L.Ed.* 445, 458-59 (1920) (noting that a statutory provision limiting loss deductions for nonresidents to losses incurred within the taxing state, whereas residents could deduct all losses, was justified because, unlike the income of nonresidents, residents' income wherever derived was subject to the state income tax); *Travelers' Ins. Co. v. Connecticut*, 185 *U.S.* 364, 22 *S.Ct.* 673, 46 *L.Ed.* 949 (1901) (upholding stockholder tax credit available only to residents because nonresidents were not liable for certain other taxes within the state); *Davis v. Franchise Tax Bd.*, 71 *Cal. App.* 3d 998, 139 *Cal. Rptr.* 797, 799 (Ct. App. 1977) (sustaining California income tax provision permitting only residents to utilize income averaging

statute on the grounds that "the nonresident could display a fluctuating California income as a cloak for non-fluctuating total income"), dismissed for want of substantial federal question, 434 *U.S.* 1055, 98 *S.Ct.* 1222, 55 *L.Ed.*2d 755 (1978); *Anderson v. Tiemann*, 182 *Neb.* 393, 155 *N.W.*2d 322 (1967) (sustaining a statute permitting only residents to take food sales tax expenses as a credit under the Nebraska income tax for the reason that the credit concerned personal or nonincome-producing activities closely related to the state of residence), dismissed for want of substantial federal question, 390 *U.S.* 714, 88 *S.Ct.* 1418, 20 *L.Ed.*2d 254 (1968); *Berry v. State Tax Comm'n*, 241 *Or.* 580, 397 *P.*2d 780 (1964) (affirming the propriety of a provision under the Oregon income tax law that allowed only residents to deduct certain personal expenses related to their place of residency, on the grounds that the provision was part of a statutory scheme that recognized the tax problems created by interstate investors and commuters and that the personal deductions were so closely related to the state of residence that they may be limited to residents of the state), dismissed for want of substantial federal question, 382 *U.S.* 16, 86 *S.Ct.* 87, 15 *L.Ed.*2d 12 (1965); *Wheeler v. State*, 127 *Vt.* 361, 249 *A.*2d 887 (affirming progressive tax structure that imposed upon nonresidents a tax determined from the nonresident's total income rather than the nonresident's Vermont income, because the nonresident was not thereby disadvantaged compared to Vermont residents), dismissed for want of substantial federal question, 396 *U.S.* 4, 90 *S.Ct.* 24, 24 *L.Ed.*2d 4 (1969).

III

The imposition of a tax on the New York commuter affects fundamental activity protected by the Privileges and Immunities Clause, the pursuit of a livelihood. *See Hicklin v. Orbeck*, *supra*; *Mullaney v. Anderson*, *supra*; *Toomer v. Witsell*, *supra*; *Ward v. Maryland*, *supra*. Prohibiting nonresidents from using state roads would affect the nonresident's freedom to trade or to operate a business or to work in an adjoining state. Indeed, the Clause "bar[s] a State from penalizing the citizens of other

States by subjecting them to heavier taxation merely because they are such citizens or by discriminating against citizens of other States in the pursuit of ordinary livelihoods in competition with local citizens." *Toomer v. Witsell*, 334 *U.S.* at 408, 68 *S.Ct.* at ____, 92 *L.Ed.* at 1477 (Frankfurter, J., concurring).

In *Salorio I* we acknowledged that the ETT tax discriminated against the New York resident. The following example illustrates that discrimination. Consider three persons each with income of $25,000[6] when

(a) one person resides in New Jersey and his income is entirely derived from sources within New Jersey;

(b) one person resides in New Jersey and his income is entirely derived from sources within New York; and

(c) one person resides in New York and his income is entirely derived from sources within New Jersey.

The total New Jersey income tax liability for a person under the above hypothetical conditions is:

	(a)	(b)	(c)
New Jersey Gross Income Tax[7]	$ 500.00	$ 0	$ 500.00
ETT[8]	0	0	1030.00
Total	$ 500.00	$ 0	$1530.00

6 In all three cases it is assumed that taxpayer's income is entirely includable as personal service income, see *N.J.S.A.* 54:8A-6.4, and that taxpayer had no losses in the taxable year, is single and was never married, is under age 65, has no children, had no uncompensated medical expenses, lives alone and does not reside in a rented dwelling.

7 Under the New Jersey Gross Income Tax, the "gross income" of all three taxpayers is equal to total income minus a $1,000 exemption. *N.J.S.A.* 54A:3-1. The tax is calculated as $400 plus 2.5% of the excess over $20,000. *N.J.S.A.* 54A:2-1. Only taxpayer "b" is allowed a credit for his entire Gross Income Tax liability because his total income was subject to New York income tax, under which his liability was in excess of $500. *N.J.S.A.* 54A:4-1.

8 Taxpayer "a" is not subject to the ETT. *N.J.S.A.* 54:8A-2. Taxpayer "b" is allowed a credit against the ETT for the amount of the income

The comparison for privileges and immunities purposes must be made between the classes of persons who earn New Jersey income, namely, the New Jersey resident with New Jersey income (example (a)) and the New York commuter with New Jersey income (example (c)). *See Austin v. New Hampshire*, 420 *U.S.* at 666, 95 *S.Ct.* at ____, 43 *L.Ed.*2d at 538. The issue does not relate to a comparison of New York's tax on New Jersey's residents with New Jersey's tax on New York residents. Rather, the issue involves New Jersey's tax on income of its residents and nonresidents.

The argument is made that the New York commuter's ultimate burden is unchanged because of the tax credit received in New York for the ETT and that therefore the Privileges and Immunities Clause is not violated. That contention was rejected by the Supreme Court in *Austin v. New Hampshire*. There the Court stated that the possibility that Maine, like New York in this case, could shield its residents from New Hampshire's tax, like New Jersey's ETT, does not cure the constitutional defect but "in effect invites [non-residents] to induce their representatives, if they can, to retaliate against it." 420 *U.S.* at 667, 95 *S.Ct.* at ____, 43 *L.Ed.*2d at 538. The Court quoted the following language from *Travis v. Yale & Towne Mfg. Co.*, 252 *U.S.* 60, 82, 40 *S.Ct.* 228, ____, 64 *L.Ed.* 460, 470 (1920):

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tax paid to New York that is based on New York income. *N.J.S.A.* 54:8A-16(8). Taxpayer "c" is not entitled to a credit against the ETT because New York neither grants a "substantially similar credit" to New Jersey residents nor exempts New Jersey residents from the New York income tax. *N.J.S.A.* 54:8A-16(A). Taxpayer "c" 's taxable income ($21,700) is equal to his total income ($25,000) minus a standard deduction ($2,500), *N.J.S.A.* 54:8A-9, and one exemption ($800), *N.J.S.A.* 54:8A-10. The tax is calculated from the statutory tax table, *N.J.S.A.* 54:8A-6, as $1,060, plus 10% of the excess over $17,000, *N.J.S.A.* 54:8A-6.4, or $470.

An individual subject to the Gross Income Tax is liable only for a sum equal to the amount of tax due and payable under the Gross Income Tax or the ETT, whichever is greater. *N.J.S.A.* 54:8A-119. Accordingly, the amount otherwise paid into the Transportation Fund is reduced by the amount otherwise due and payable under the Gross Income Tax.

> New York has no authority to legislate for the adjoining States; and we must pass upon its statute with respect to its effect and operation in the existing situation. . . . A State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other States. Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution. [420 *U.S.* at 667, 95 *S.Ct.* at ____, 64 *L.Ed.*2d at 539]

The State's justification for the differential imposed on the nonresident is that his commuting has created a need for additional facilities to meet the commuting crunch between New York and New Jersey during certain peak hours in the morning and afternoon. That being so, the expenditures attributable to the New York-to-New Jersey commuter should be borne by him. If true, it follows that the nonresident commuter could be required to pay up to an approximation of those expenditures. The charge imposed upon the commuter on the basis of benefits he derived from the use of those transportation facilities may have no relationship to the costs and would therefore violate the principle that there must be a "substantial relationship" between the problem and the discrimination.[9]

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9 Some misunderstanding arose because of certain language in *Salorio I* with respect to the admeasurement of the New Yorker's fair share of the costs of the transportation facilities. It was and is our opinion that the State may exact from the New York resident "a fair share of the cost of adequate transportation facilities," 82 *N.J.* at 506, and that the nonresidents are chargeable "to the extent of their contribution to the transportation problem," *id.* at 508-09. We referred to the "additional expenses occasioned by their activities within the state, or on account of the reasonable costs of benefits which they receive from the state." *Id.* at 503. Our references to "benefits" in *Salorio I* were to the costs of those benefits.

We afforded the State an opportunity after oral argument to produce additional evidence, but it asserted "that the present record contains all available data which would be pertinent to a cost allocation for the New York to New Jersey commuting class."

The peak commuting travel periods are from 7:00 a.m. to 10:00 a.m. and 4:00 p.m. to 7:00 p.m. It is this demand in those periods that the State has attempted to satisfy by expanding transportation facilities and expanding bus and train service. New York commuters have constituted a small proportion of the total interstate and intrastate commuter volume—3.5% in 1960, 2.9% in 1970 and 4.0% in 1980. New Jersey to New York commuters substantially outnumber those travelling from New York to New Jersey. The following chart demonstrates that fact:

Journey to Work, Within, From and to New Jersey— All Modes	*1960*		*1970*		*1980*	
	Number of Trips	*Percent of Total*	*Number of Trips*	*Percent of Total*	*Number of Trips*	*Percent of Total*
New Jersey-New Jersey	1,341,396	85.2%	1,839,966	86.7%	1,938,883	86.3%
New Jersey-New York	177,459	11.3%	221,300	10.4%	226,674	9.7%
New York-New Jersey	55,049	3.5%	62,018	2.9%	90,157	4.0%
Total	1,573,904	100.0%	2,123,284	100.0%	2,255,714	100.0%

Although the State has not shown that New York commuters cause higher average costs per commuter than New Jersey commuters, the New York commuter does exacerbate the peak load. Accordingly, both incremental and average costs are pertinent factors in determining the costs attributable to the New York commuter.

According to one of the State's experts, whose testimony the trial court accepted, New York commuters are responsible for only 3% to 3.7% of highway expenditures allocable to the commuting class, 3% to 4% of railroad subsidies by the State, and 15% of bus-operating subsidies by the State. The allocation of 15% of the bus subsidy is suspect because in 1980 New York bus commuters constituted only 7-1/2% of total interstate bus commuters and less than 2-1/2% of combined interstate and intrastate bus commuters. The trial court summarized the expert's factual analysis as follows:

> Simpson and Curtin also included a compilation of State expenditures for mass transit during the study period. They next defined the 10-county study area and then

allocated State expenditures to the area. First they noted that northern New Jersey had 75% of the expenditures during the 1960's and 1970's and contained 55% of the total route mileage within the State. The 55% was increased by 15% because the road width is greater in northern New Jersey by 20 to 25% than in south Jersey. Finally another 15% was added since construction and maintenance costs for highways run 10-25% higher in the northern 10 counties, in part because of higher cost of living and union wage scales. Therefore, Simpson & Curtin allocated 75% of all State highway expenditures in the 1960's and 70% of the 1970 expenditures to the study area.

Proceeding to the five categories of study, Simpson & Curtin allocated 96% of highway construction and right-of-way costs to commuter travel, as well as 90% of the maintenance. (100% of the transit subsidies were allocated to commuters). This is based in part on the preceding calculations together with Mr. Curtin's testimony that highways are designed for the thirtieth highest hourly volume [in the year], which just happens to fall in the peak period. Defendant states that most of the highway network was built prior to the 1960's and what was needed in the 1960's and 1970's was merely the "widening and improving" of these roadways to accommodate the commuter.

The final step in the Simpson & Curtin report was to allocate the expenditures to the New York commuter. Utilizing a variety of sources, Simpson & Curtin determined that during the 1960's, 3% and during the 1970's 3.7% of all highway commuters were New York commuters. 15% of all bus commuters were said to be New York commuters since that percentage of buses left New York during the morning peak and arrived in New York during the evening peak period. Consequently, 15% of the operating and capital subsidies were allocated to the New York commuter, because "equipment utilization is the indicator of operating costs and not passengers carried."

> Total State transportation expenditures attributable to the New York commuter over the 20-year period were $255,299,111 or $182,973,042, omitting the federal assistance. Both numbers are significantly lower than the $380,634,000 in tax collected.

The plaintiffs have disputed nearly every element of the State's allocation of expenditures. However, even if these allocation charges are not overstated, the tax must fall because it fails that part of the *Hicklin* test requiring a substantial relationship between the tax imposed on New York nonresident commuters and the burden imposed by them on New Jersey's transportation system. According to the records of the Department of Treasury, Division of Budget and Accounting, as submitted by the State's expert, Simpson & Curtin, the ETT tax generated a total of $500 million from the fiscal year 1962 through fiscal year 1980, of which $112 million were transferred to the Property Tax Relief Fund. Net ETT receipts after cost of collection were $381 million. The State's experts concluded that "each year the tax has exceeded the New Yorker's share of transportation costs." Over two decades the costs have totalled $182 million, approximately 48% of the $381 million charge imposed. According to the evidence submitted by the State's expert, this disparity has continued unabated in the tax years following the effective date of the Gross Income Tax:

	ETT Receipts (excluding refunds, cost of collection, and transfers to Property Tax Relief Fund)	*Transportation Cost Burdens allocable to New York-Based Commuters (excluding Federal Assistance)*	*Ratio of Transportation Cost Burdens (Column 2) to ETT Receipts (Column 1)*
1977	$29,899*	$13,576(*)	45%
1978	20,334	14,551	72%
1979	34,630	13,534	39%
1980	33,865	84,088	42%

* Dollars in Thousands

We find that the relationship between net ETT receipts and transportation costs allocable to New York-based commuters over the entire life of the tax and during recent years is too disparate to withstand constitutional challenge.

IV

We are not concerned with a broad-based revenue scheme. Thus, the portion of the ETT collection remitted to the Property Tax Relief Fund under the New Jersey Gross Income Tax is not at issue. Instead what is involved is that part of the ETT tax that is allocated to the Transportation Fund and used for transportation measures to alleviate the commuter transportation problems caused by the severe peakload demands during usual commuter hours. In connection with the enactment of the gross income tax in 1976, the Legislature reduced the ETT liability by the amount due and payable under the New Jersey Gross Income Tax Act. *L.*1976, *c.*66 (codified at *N.J.S.A.* 54:8A-119 to121). New York residents are subject to disparate income tax treatment only for the ETT liability in excess of the amount due under the New Jersey Gross Income Tax. We are concerned with only this excess tax liability.

No one questions the legitimacy of imposing the New Jersey Gross Income Tax on the income earned in New Jersey by nonresidents. It is well-established that a state may constitutionally impose a tax on nonresidents' income derived from sources within the state. *Shaffer v. Carter*, 252 *U.S.* 37, 40 *S.Ct.* 221, 64 *L.Ed.* 445 (1920); *see Austin v. New Hampshire*, 420 *U.S.* at 664-65, 95 *S.Ct.* at ____ , 43 *L.Ed.*2d at 537; *see also* Hellerstein, "Some Reflections on the State Taxation of a Nonresident's Personal Income," 72 *Mich. L. Rev.*, 1309, 1312, 1318 (1974). Plaintiffs' entire tax liability under the general gross income tax is not involved. *N.J.S.A.* 54A:5-5,8.

V

There remains for consideration the appropriate relief to be afforded. Plaintiffs seek a judgment declaring the statute unconstitutional, enjoining enforcement of the act, and award-

ing them damages on the basis of taxes paid.[10] Because we have found the ETT to violate the Privileges and Immunities Clause, plaintiffs are entitled to a declaratory judgment. Plaintiff's theory for reimbursement of the ETT taxes paid is the traditional one: an unconstitutional act is void from its inception and everything done thereunder must be undone. The modern view is that invalidation of a statute does not automatically invalidate all prior transactions made in justifiable reliance upon the statute. *Compare Norton v. Shelton County*, 118 *U.S.* 425, 6 *S.Ct.* 1121, 30 *L.Ed.* 178 (1886), *with Lemon v. Kurtzman (Lemon II)*, 411 *U.S.* 192, 93 *S.Ct.* 1463, 36 *L.Ed.*2d 151 (1973). " '[T]he federal constitution has no voice upon the subject' of retrospectivity." *United States v. Johnson*, ___ *U.S.* ___, ___, 102 *S.Ct.* ___, ___, 73 *L.Ed.* 202, 208 (1982) (quoting *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 *U.S.* 358, 364, 53 *S.Ct.* 145, ___, 77 *L.Ed.* 360, 366 (1932)). It is important to recognize that we are acting within the framework of appropriate equitable relief with respect to an unconstitutional taxation statute and not with regard to the retrospective effect of a new rule of criminal procedure, *United States v. Johnson*, ___ *U.S.* ___, 102 *S.Ct.* ___, 31 *L.Ed.*2d 202 (1982); or a substantive constitutional principle, *United States v. United States Coin & Currency*, 401 *U.S.* 715, 91 *S.Ct.* 1041, 28 *L.Ed.*2d 434 (1971); or a rule of judge-made law applicable to civil proceedings, *Mirza v. Filmore Corp.*, 92 *N.J.* 390 (1983); *Cogliati v. Ecco High Frequency Corp.*, 92 *N.J.* 402 (1983). Factors that may be relevant in the criminal field, such as integrity of the judicial process, impairment of the basic purpose of the jury to determine the truth, or in the common law in civil matters in which other policy considerations are involved, may or may not be applicable here.

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10 A pending class action, seeking the same relief, has been stayed until final determination of all issues in *Salorio v. Glaser. Yowell v. Glaser*, No. C-2910-77 (Ch. Div., Bergen County, Oct. 16, 1978 (order staying proceedings)).

Lemon II is particularly instructive. The United States Supreme Court had held unconstitutional a Pennsylvania statute under which the Commonwealth of Pennsylvania reimbursed private sectarian schools for certain secular educational services. *Lemon v. Kurtzman (Lemon I)*, 403 *U.S.* 602, 91 *S.Ct.* 2105, 29 *L.Ed.*2d 745 (1971). Issues then arose with respect to reimbursement of funds previously paid and to the future payment for services rendered before the opinion declaring the act unconstitutional. The District Court enjoined payments for services rendered after the Supreme Court's decision on June 28, 1971, but permitted the State to pay the schools for services provided before. The Supreme Court affirmed.

Chief Justice Burger, writing for the Court, stated that retroactivity depended upon a consideration of the particular relations between and conduct of the parties, of rights that had vested, of status, of prior determinations deemed to have finality, and of public policy. He stressed that statutory law is a "hard fact[] on which people must rely in making decisions and in shaping their conduct." 411 *U.S.* at 199, 93 *S.Ct.* at ____, 36 *L.Ed.*2d at 160. He also noted that the problem before the Court was "essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional." *Id.*, 93 *S.Ct.* at ____, 36 *L.Ed.*2d at 161. Equitable remedies, he wrote, "are a special blend of what is necessary, what is fair, and what is workable." *Id.* at 200, 93 *S.Ct.* at ____, 36 *L.Ed.*2d at 161 (footnote omitted).

"[R]eliance interests weigh heavily in the shaping of an appropriate equitable remedy." *Id.* at 203, 93 *S.Ct.* at ____, 36 *L.Ed.*2d at 163; *see also Chevron Oil Co. v. Huson*, 404 *U.S.* 97, 92 *S.Ct.* 349, 30 *L.Ed.*2d 296 (1971). This is particularly so in this case where invalidation of the ETT tax blocks a source of revenue heretofore available to the state. Our holding today is the equivalent of a new rule of law. *Cf. State v. Burstein*, 85 *N.J.* 394, 406 (1981). Under these circumstances, as Judge Conford expressed in *Oxford Consumer Discount Co. v. Stefanelli*, 104 N.J. Super. 512, 520 (App. Div. 1969), aff'd, 55 *N.J.* 489 (1970):

> There is no question but that appellate courts in this State and elsewhere have long regarded themselves as empowered and justified in confining the effect of a decision of first impression or of novel or unexpected impact to prospective application if considerations of fairness and justice, related to reasonable surprise and prejudice to those affected, seemed to call for such treatment.

Foremost among the factors to be considered is the State of New Jersey's justifiable reliance upon the availability of the ETT funds. We have consistently and frequently advised that a duly enacted statute is presumptively valid. The officials, legislative and executive, were entitled to rely on that presumption. Further, some consideration should also be given to the reciprocal arrangement made between New York and New Jersey in 1962. New York was to allow its residents a credit for payments under the ETT and New Jersey would grant its residents a credit against ETT for income taxes paid to New York. Though we questioned the validity of the accord under the Compact Clause of the federal constitution, *U.S. Const.*, art. I, § 10, cl. 3; see 82 *N.J.* at 512, we did not rule out the possibility that "[r]eciprocally favorable treatment of non-residents [may] not violate the Privileges and Immunities Clause," if the accord were interpreted to bind New York's power to extend tax credits to its residents. *Id.* at 513 (quoting *Austin v. New Hampshire*, 420 *U.S.* at 667 n.12, 95 *S.Ct.* at 1198 n.12, 43 *L.Ed.*2d at 539 n.12).

The legislative and the executive branches of government have relied on the ETT for many years in preparation of budgets, with respect to both income and expenditures, and in making appropriations and expenditures. The expenditures cannot be undone and reimbursement would have a substantial effect on the State's existing financial requirements. Public fiscal stability is at issue.

Furthermore, no one challenged the ETT until June 1977, fifteen years after the ETT was enacted. Nor did the plaintiffs seek interim injunctive relief during the pendency of this

action, presumably because their right to relief was not clear. *See Citizens Coach Co. v. Camden Horse R.R. Co.*, 29 *N.J. Eq.* 299 (E. & A. 1878). It is of considerable moment that the plaintiffs have suffered no financial harm because they have received a credit for the amount paid to New Jersey against their New York income tax. Under these circumstances, we believe that reimbursement is not warranted.

The course of non-retroactivity when invalidating public revenue raising measures is not without precedent. In *Hurd v. City of Buffalo*, 41 *A.D.*2d 402, 343 *N.Y.S.*2d 950 (1973), aff'd, 34 *N.Y.*2d 628, 311 *N.E.*2d 504, 355 *N.Y.S.*2d 369 (1974), the New York Court of Appeals permitted the City of Buffalo to retain monies collected under an ordinance violative of the State Constitution because "the fact is that the City has relied on the additional taxes which it was able to impose because of the statute, and has spent the revenues derived thereby." *Id.* at ____, 343 *N.Y.S.*2d at 953. The City was also permitted to retain amounts paid under protest after the Appellate Division opinion declaring the tax invalid. *Pellnat v. City of Buffalo*, 59 *A.D.*2d 1038, 399 *N.Y.S.*2d 788 (1977).

The Supreme Court of Florida struck down a statute authorizing school districts to levy *ad valorem* taxes but refused to order refunds in view of the defendant school board's good faith reliance on a presumptively valid statute and the budgetary and administrative burdens a refund would cause. *Gulesian v. Dade County School Bd.*, 281 *So.*2d 325 (Fla. 1973); *accord*, *International Studio Apartments Ass'n v. Lockwood*, 421 *So.*2d 1119, 1123 (Fla. App. 1982) (unconstitutionality of statute providing that interest earned on funds deposited with court clerk belongs to clerk's office held effective prospectively only, in light of "injustice and hardship on the clerk and county by mandating the return of monies long since expended"). The Michigan Supreme Court in *Hays v. Regents of the Univ. of Michigan*, 393 *Mich.* 756, 223 *N.W.*2d 276 (1974) (modifying 53 *Mich. App.* 605, 220 *N.W.*2d 91), held that, despite the invalidity of a state tuition, no refund need be made concerning semesters preceding the commencement of the suit.

Many factors that justify our refusal to grant reimbursement are equally applicable in determining the effective date of our opinion. The State has anticipated and collected ETT revenues for more than twenty years. At present those revenues exceed $30,000,000 per year. They are an established part of New Jersey's budget and are related to expenditures used for the public welfare, including transportation projects that benefit New York residents such as the plaintiffs. Elimination of this source of revenue will require a reduction in expenditures, or an increase in alternative revenues, or creation of new taxes, or some combination of the foregoing. The State's fiscal year ends June 30, 1983 and the budget for the ensuing year must be in place by that date. Given today's budgetary constraints, the competing interests for funds for many worthwhile purposes, and the difficulty in enacting additional taxes, it is unrealistic to expect that the Legislature and Executive will reasonably be able to resolve the best method of dealing with the anticipated loss by that time. Moreover, there are administrative problems to be attended to upon the effectiveness of this decision. For example, many employers will be required to modify deductions from wages and salaries and make changes in their payroll systems. Furthermore, as previously observed, the plaintiffs will not suffer any financial loss from a prospective date, because they will continue to receive a full credit against their New York income tax for the ETT tax paid.

We are persuaded to fix a prospective date because of our concern for the fiscal and administrative problems that would be engendered if the State were compelled to surrender ETT receipts before the end of the fiscal year. The State should be afforded a reasonable period of time to devise alternative revenue raising methods, abandon or postpone transportation projects or consider some other suitable solutions. We believe that relief against enforcing the ETT tax with respect to income earned on and after January 1, 1984 will accommodate these concerns.[11] This date is also coordinate with the fiscal year of

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11 In passing we note that roughly half of the ETT tax would be justifiable when related to the costs.

most individuals and will permit employers and employees sufficient opportunity to solve any bookkeeping or related problems.

The procedure we have adopted accords with relief that we have afforded the Legislature or other governing bodies in comparable cases, providing the opportunity to devise alternative funding schemes. *See Pascucci v. Vagott*, 71 *N.J.* 40 (1976) (holding effectiveness of invalidity of general assistance benefit schedule postponed for at least "60 days from the date of the filing of this opinion . . . to accommodate and give time for solution of legislative, executive or administrative problems"); *Robinson v. Cahill*, 62 *N.J.* 473, 520-21 (1973) (declaring State system of financing public education to be unconstitutional and stating that because "some period of time will be needed to establish another statutory system, obligations hereafter incurred pursuant to existing statutes will be valid in accordance with the terms of the statutes"); *Borough of Neptune City v. Borough of Avon-by-the Sea*, 61 *N.J.* 286, 310-11 (1972) (holding illegality of higher beach fee charged nonresidents than residents not to be retroactive because "Avon very likely has operated its budget and financial affairs on the basis of the beach user fees expected to be collected under the present schedule in reliance upon the trial court decision [sustaining the ordinance]"); *see also Switz v. Middletown Twp.*, 29 *N.J.* 580, 598 (1957) (compelling municipal assessor to value and assess all taxable real property at full and fair value in compliance with state constitution, effective in three years "to afford the Legislature the opportunity to take such measures and provide for such administrative procedures as its own inquiry may prove to be essential to the public interest and to allow the Township [the] time needed" to effectuate revaluation program); *Hellerstein v. Assessor of Town of Islip*, 37 *N.Y.*2d 1, 14, 332 *N.E.*2d 279, 387, 371 *N.Y.S.*2d 388, 399 (1975) (holding invalid real property assessment for tax purposes in June 1975 to be corrected within "a reasonable time, but not later than December 31, 1976"), modified, 39 *N.Y.*2d 920, 352 *N.E.*2d 593, 386 *N.Y.S.*2d 406 (1976) (postponing effective date until July 1, 1978).

We are not unmindful of our broad discretionary power in the balancing of all hardships and equities in shaping an equitable decree. "Equity courts have often recognized matters of public policy, convenience of administration, and practicality as matters to be weighed in the scales along with the matters of justice and morality." D. Dobbs, *Remedies* 56 (1973). Prospectivity illustrates the principle that equitable remedies "are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties." 1 J. Pomeroy, *Equity Jurisprudence* § 109, at 122-23 (4th ed. 1918), quoted approvingly in *Sears, Roebuck & Co. v. Camp*, 124 *N.J. Eq.* 403, 411-12 (E. & A. 1938). Accordingly, prospectivity has been utilized to reach equitable results. Thus, as previously noted, the United States Supreme Court in *Lemon II* approved a decree entered in accordance with traditional equity powers compelling Pennsylvania to make a payment under an unconstitutional statute.

The judgment of the trial court is reversed, and the matter is remanded to that court for entry of judgment in accordance with this opinion. Jurisdiction is not retained.

Chief Justice Wilentz and Justices Clifford, Garibaldi and Sullivan and Judges Matthews and Fritz join in this opinion.

APPENDIX B

Opinion of the Superior Court of New Jersey, Chancery Division, dated October 9, 1981

SUPREME COURT OF NEW JERSEY

CHANCERY DIVISION—BERGEN COUNTY

DOCKET NO. C-3628-76

CALENDAR NO. 77-1781

JOHN SALORIO, ROBERT COE and JOHN D. MCGARR, JR.,

Plaintiffs,

—VS.—

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury, State of New Jersey,

Defendant.

Decided: October 9, 1981.

Adrian M. Foley, Jr. and Kevin J. Coakley for plaintiff (Connell, Foley & Geiser, attorneys).

Max Gitter a member of the New York Bar, *pro hoc vice*, for plaintiffs.

Michael R. Cole, Assistant Attorney General, Joseph C. Small and Herbert K. Glickman,

Deputy Attorneys General, for defendant (James R. Zazzali, Attorney General of New Jersey, attorney).

OPINION

PETRELLA, J.S.C.

Plaintiffs, New York residents, in a declaratory judgment action attack the constitutionality of the Emergency Transportation Tax Act (hereafter sometimes "ETT") *N.J.S.A.* 54:8A-1. The case could equally be in the law division as a declaratory judgment action or because of the constitutional challenge.* Because the ETT is paid solely by New York residents, it was challenged as violative of the Privileges and Immunities Clause as well as the Equal Protection Clause of the Federal Constitution. The State of New Jersey defends the tax (through its Director of Taxation) on the basis of the existence of a "transportation emergency."

After a trial before Judge Lester the Superior Court, Chancery Division held the ETT constitutional. It was found that the criteria of "substantial equality" set forth in *Austin v. New Hampshire*, 420 *U.S.* 656, 95 *S.Ct.* 1191, 43 *L.Ed.* 2d 530 (1975) was met and, therefore, the argument based upon the Privileges and Immunities Clause had to fail. In response to plaintiffs' Equal Protection argument, the Court found that a proper governmental purpose was demonstrated and upheld the tax.

Plaintiffs appealed. The Supreme Court granted direct certification and sustained the statute against the Equal Protection challenge. However it found that the trial court had defined the issue under the Privileges and Immunities Clause too narrowly—*i.e.*, "whether or not the *Austin* case is dispositive

* No one has raised the question of whether it would be more appropriate now in the Tax Court.

of the (validity of the ETT) legislation." *Salorio v. Glaser*, 82 *N.J.* 482, 489 (1980). Rather, it said the proper issue was whether the nonresidents constitute "*a peculiar* source" of the evil at which the statute is aimed, thus permitting this discrimination in the application of the ETT. 82 *N.J.* at 503 (quoting *Hicklin v. Orbeck*, 437 *U.S.* 518, 525-526, 98 *S.Ct.* 2482, 2488 57 *L.Ed.* 2d 397, 404 (1978)).

This case was heard as a result of a partial remand of Judge Lester's decision.

The prior record before Judge Lester has been stipulated in this case as well as the authenticity of expert reports and the sampling procedure used by National Analyst.

I have considered the testimony, the exhibits, and the record and have taken into account all the factors a finder of fact takes into account. To the extent the testimony is inconsistent with my findings, I obviously did not accept or believe that testimony.

I.

The ETT, enacted in 1961, is tied into the taxing scheme of both New Jersey and New York. The statutory scheme is amply set forth in the Supreme Court opinion and need not be repeated here. See, 82 *N.J.* at 493. Under ETT, a tax was levied on income derived by New Jersey residents from sources in New York, while New York residents who derived income from sources within this State were also taxed. Following various amendments to the laws of each state, and by operation of the statutory provisions, it happened that New Jersey residents who commuted to work in New York do not pay the ETT because of the higher New York tax rate, but they have paid an equivalent sum to New York under the Personal Income Tax of that state. See, *N.J.S.A.* 54:8A-16. The New York residents working in New Jersey pay the ETT, but they have received a credit on their New York Personal Income Tax for payments so made.

Originally, all ETT receipts were to go to a special Transportation Fund. With the passage of the New Jersey Gross Income

Tax Act, *N.J.S.A.* 54A:1-1, *et seq.*, both residents and nonresidents earning income in New Jersey became subject to the 2%-2 1/2% New Jersey Income Tax. The ETT will be higher than the 2 to 2 1/2% New Jersey Income tax because the New York tax rates are presently higher. The full amount of the ETT collected does not go to the Transportation Fund. Before being deposited in the Transportation Fund, the amount of money equal to the Income Tax is withdrawn, so that only the excess over the Gross Income Tax amount finds its way into the Transportation Fund. *N.J.S.A.* 54: 8A-120. This was taken into account by the New Jersey Supreme Court in refusing to hold the statute unconstitutional, at least at that time.

Our Supreme Court has held that a state may impose upon nonresidents the reasonable costs of benefits which they receive from the state, taking into account substantial equality. The State has the burden of proof to demonstrate that the nonresidents are a "peculiar source" of the evil at which the statute is aimed. 82 *N.J.* at 503-506. Different views on whether it must be "a" or the "peculiar source" are taken by the parties based on what may superficially appear as conflicting language in the Supreme Court's opinion. I conclude it must be *a* peculiar source based on the quotations and the language in 82 *N.J.* at 505 which speaks of "a 'valid independent reason' " existing to sustain the tax, and the further references on that page to "a 'peculiar source.' " If nonresidents are a peculiar source of the evil (problem), then it remains to determine whether the discrimination bears a substantial relationship to the particular evil (problem) that the nonresidents are said to present.

Due to the paucity of the record before it (notwithstanding counsel's position that all facts were before it), the Supreme Court could not make the necessary determinations. However, it did state at one point that the ETT could not be upheld if the tax burden on New York residents is disproportionate to their burden upon New Jersey transportation facilities. To aid the Court on this remand, specific guidelines were set forth in 82 *N.J.* at 509:

> On remand, evidence should be introduced to enable the trial court to compare the transportation *benefits* New

> York residents receive and the tax contributions they are required to make. The data must therefore include statistics on annual state and local *expenditures*—identified by source—for commuter *rail* and *bus services* and for construction and maintenance of *highways* used by interstate commuters. Figures on the amount and application of ETT monies must also be presented. Commutation figures must be introduced for the years during which non-residents paid emergency transportation taxes. The total number of New Jersey to New York commuters and the proportion by which they exceed New York to New Jersey commuters would be a relevant consideration. Travel figures must also take into account the substantial amount of *intrastate use* of all facilities funded. (footnote omitted)(emphasis added).

Preliminarily I note that the Supreme Court stated (82 *N.J.* at 502) in connection with its analysis of the substantially more rigorous judicial review of a taxing program when challenged under the Privileges and Immunities Clause:

> . . . Absolute equality is not required, however. Inexactitude is permissable when a state fairly attempts to distribute the burdens and costs of government to those receiving its benefits:
>
> > It is enough that the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against nonresidents. [*Traveler's Ins. Co. v. Connecticut*, 185 *U.S.* 364, 371, 22 *S.Ct.* 676, 46 *L.Ed.* 949, 954 (1902)].

The New Jersey Supreme Court also noted that the United States Supreme Court in *Austin v. New Hampshire*, 420 *U.S.* 656, 95 *S.Ct.* 1191, 43 *L.Ed.* 2d 530 (1975), announced that under the Privileges and Immunities Clause the Rule is one of "substantial equality of treatment." As stated by Justice Pashman:

> While invoking close scrutiny, disparity of treatment does not violate this Rule if it has a valid justification independent of mere citizenship.

> Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures. [Citing *Toomer v. Witsell*, 334 *U.S.* at 396, 68 *S.Ct.* at 1162, 92 *L.Ed.* at 1471 (footnote omitted)].
>
> [82 *N.J.* at 503]

Both sides produced expert testimony and reports to bolster their respective positions on this remand. The State relied on the reports submitted by Simpson & Curtin and Wilbur Smith Associates. Plaintiffs also produced two expert witnesses and their reports: one by Mr. Netzer and a second by Vollmer Associates.

The State reads the Supreme Court's decision broadly. Essentially, its position is that of a cost/benefit analysis. The ETT payments need only be substantially proportionate to the costs incurred by New Jersey to provide New York commuters with transportation facilities, or, "substantially commensurate with the benefit they derive from their use of New Jersey's transportation facilities." 82 *N.J.* at 506. Therefore, it is the State's contention that there is no need to trace ETT money to specific transportation projects undertaken to ease the burden placed upon New Jersey by the New York commuter.

Plaintiffs dispute this analysis since they read the Supreme Court's decision as requiring the tax payments made by New York commuters to be substantially proportionate to the expenditures made by New Jersey to alleviate the burden placed on the New Jersey transportation system by a peculiar source—the New York commuter. Rather than relying on the cost benefit theory, plaintiffs utilize the average or proportional method and the incremental method to demonstrate the relationship between the burden placed on the transportation system and the expenditures made by New Jersey to deal with the additional problems caused by the New York commuter.

Both sides utilize language from the Supreme Court's opinion to justify their respective positions. Stressing the analyses under the Privileges and Immunities discussion as opposed to that under the Equal Protection discussion can lead to conflicting conclusions. This of course has led to the disagreement of the parties as to "methods of analysis chosen and the accuracy of the application of those methods."

Plaintiffs contend it is the State's burden to demonstrate that "the share of the cost to the New Jersey government of providing transportation facilities to the New York commuter" is reflected in the amount of tax paid by the New York commuter. Reliance for such a *cost* theory is placed on two passages from the Supreme Court's opinion. They are:

> The State may exact from [New Yorkers] a fair share of the cost of adequate transportation facilities without violating the Privileges and Immunities Clause. 82 *N.J.* at 506.]
>
> . . . . A state may therefore impose upon non-residents the additional expenses occasioned by their activities within the state, or the reasonable costs of benefits which they receive from the state. 82 *N.J.* at 503.]

Plaintiffs argue that the tax must be compared to the dollar amount *expended* by New Jersey to correct the transportation problem posed by New York commuters.

The State argues that the ETT is justifiable if the *benefits* which the New York commuters receive are "substantially proportionate" to the amount of tax actually paid. The defendant also relied on specific quotations from the Supreme Court's opinion:

> . . . the ETT would be justified if its burden on New York commuters is substantially commensurate with the benefit they derive from their use of New Jersey's transportation facilities. [82 *N.J.* at 506]
>
> . . . . To sustain the tax, there must be a showing that he impact of ETT on non-residents along with their other contributions for public transportation expenses, is sub-

stantially offset by the benefits they receive from transportation services. [82 *N.J.* 507-08]

The State further argues that there is no need to trace ETT revenues to specific transportation projects. Rather, what is required is that the payments by New York commuters be substantially proportionate to the costs of New Jersey's transportation facilities allocable to New York commuters *or* the benefits these facilities provide to the New York commuter.

Plaintiffs say the benefits referred to by the New Jersey Supreme Court refer only to benefits derived from the specific expenditures for transportation facilities made on behalf of the New York commuter. Moreover, plaintiffs argue that if the State's benefit theory were applied to its own residents, the New York commuter would be paying $1 for each dollar of benefit, while the New Jersey resident would be paying only between 12-16 cents for the same $1 benefit.

The New Jersey Supreme Court noted that a state may impose upon nonresidents the additional expenses occasioned by their activities within the State, or the reasonable cost of benefits which they receive from the State. Thus, plaintiffs' argument that the benefit approach should not be considered in this context is foreclosed to this trial court, as is the Equal Protection argument.

As I read the Supreme Court's opinion, what has to be shown to sustain the tax is that the New York commuter "exacerbated the problem." The State does not have to prove that the New York commuter is *the* peculiar source of the transportation problem. New Yorkers do impose costs on New Jersey's transportation system. This exacerbates the transportation problem.

In *Austin v. New Hampshire*, 420 *U.S.* 656, 95 *S.Ct.* 1191, 43 *L.Ed.*2d 530 (1975) the United States Supreme Court struck down a statute similar to the ETT because New Hampshire failed to demonstrate any reason why the tax fell exclusively on nonresidents. Substantial equality was the governing principle and was not shown to exist in the *Austin* case since New Hampshire merely diverted tax revenues which would have been paid to a neighboring state.

In *Hicklin v. Orbeck*, 437 *U.S.* 518, 98 *S.Ct.* 2482, 57 *L.Ed.* 2d 397 (1978), the Alaska legislature had enacted a statute which required all employers connected with gas and oil exploration to hire qualified Alaskan residents rather than nonresidents. The statute was enacted to remedy Alaska's "uniquely high unemployment." The nonresident worker was not found to be *the* "peculiar source" of the state's problem. Rather, the "major cause" of Alaska's high unemployment was attributable to "the fact that a substantial number of Alaska's jobless residents—especially the unemployed Eskimo and Indian residents—were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities." 437 *U.S.* at 526-527. Excluding skilled nonresidents from Alaskan jobs only alleviated the state's problem to the extent that jobs for which untrained residents were being prepared were not being taken in the interim.

The Supreme Court said that even if nonresidents could be considered *the* peculiar source of Alaska's unemployment problem, the statute would still fail because it did not bear a "substantial" relationship to the particular "evil" the nonresidents were said to present. Both skilled and unskilled Alaskans were given a preference. Such an across the board preference did not aid the unskilled habitually unemployed Alaskan whom the Act was intended to benefit. Therefore, the statute was found unconstitutional under the Privileges and Immunities Clause.

II

The State's burden in the instant action is to demonstrate that the New York commuter is either a peculiar source of the evil or problem at which the ETT is aimed or that he receives benefits which are reasonable with reference to the tax imposed.

There is clearly a severe transportation problem in the New York-New Jersey metropolitan area. It is particularly acute during commuter travel hours.

Over 7,000,000 people travel from home to work every weekday in the New Jersey-New York metropolitan area, most of this travel by auto, railroad and bus. The work-bound trip in the morning centers in the peak time from 7 to 10 a.m. while the homeward trip is in the 4 to 7 p.m. time period.

Commuter travel makes up the great bulk of peak-hour travel. Peak hour overload is virtually synonymous with commuter travel and that overload creates the demand for more facilities.

New York City also has a transportation problem, but they have a much more extensive subway system which makes the problem somewhat less comparable.

As the New York access links opened they gave rise to the necessity for increasingly extensive networks of highways that opened up the entire metropolitan area. Indeed, this has resulted to date in the necessity of widening the New Jersey Turnpike to twelve lanes in the northeast New Jersey metropolitan area.

Relocation of industry and population centers developed as a consequence of all of this with a decline in rail transportation and dependency on railroads and ferries. To a large extent it appears that much of the large expenditures on highway, bus and rail transportation facilities in New Jersey at or near or feeding into the crossings into Manhattan were required essentially to service New York City which obviously also has many bedrooms in New Jersey.

To a large extent the impact of New York City, the daily reciprocal exchange of commuters for work, as well as travel for shopping and leisure, renders the New York metropolitan area unique. For example, there are 70 municipalities in Bergen County. In almost all instances it is virtually impossible to distinguish where one community ends and the next begins. Not only Bergen County, but other counties in the study areas, have similar density characteristics, *e.g.*, Essex County, Hudson County, Union County and Passaic County. This Court can take judicial notice of the census population figures. As of the 1970 census New Jersey had a census population of 7,192,805. Thus, New Jersey became eighth among the states

in terms of population size, although forty-eighth in regard to area. By virtue of the 1970 census it also became recognized as the most densely populated state in the nation with 957.2 persons per square mile.

The expansion of business opportunities and the overdependence on the automobile gave rise to new industrial centers and new centers of population. This gave rise likewise to the necessity for increased bus transportation facilities and access roads. Mass transit by rail did not meet the challenge. Public transportation is apparently heavily subsidized because of the unprofitability of the operations, in large part due to the lack of sufficient demand to support it during off-peak or noncommuter-type operations for the magnitude required by the commuter operations. Hence, the taxpayer has been increasingly asked to carry the burden of mass transportation in this and all heavily urbanized areas. The New York metropolitan area is also one of the highest, if not the highest, cost-of-living areas in this country and the high cost of labor, goods and material has contributed to what has developed into a transportation emergency. Obviously, in the relatively small land area involved, an adequate road network might well require paving most of the acreage presently utilized for business and residence. Apparently, each increase in road capacity has been matched by increased urban sprawl.

The magnitude of the transportation problem, which has reached a critical stage, is evident in traffic congestion at the arteries leading into New York. As noted, even construction of multilane expressways has not alleviated these problems on the roads and streets leading to those major connecting links with New York. The roads in northern New Jersey are operating above capacity and public transportation has declined. Over the last 20 years the situation has gone from bad to worse. Essentially Mr. Curtin's presentation in Chapter I of D-1 is accepted as accurately reflecting the development of the area.

It is recognized, of course, that census figures are not totally accurate. Use of any statistical figures inherently suffers from this infirmity. Indeed, there are many dangers from relying too heavily on statistics and forgetting what the real world is all

about. However, it is obvious that the Court must be practical, although it cannot be absolutely certain of any of these figures and projections. An appropriate prefatory statement in this regard will be a reference to the rather famous publication by Darrell Huff, entitled "How to Lie With Statistics." Most students of economics and statistics would not hesitate to say that anything could be proved with statistics. As a rather prominent individual named Disraeli once said, "There are three kinds of lies: lies, damned lies, and statistics." In any event, as a practical matter the Court has to proceed with the information that is available, being aware of the deficiencies and of the potential pitfalls and potential misuse of figures.

A

In 1970, according to census bureau figures, there were 6,677,850 work sites, 4,775,866 in New York and 1,901,984 in New Jersey. This meant that roughly 29% of the job sites were in New Jersey. There were 62,018 New York workers out of 4,616,584 who worked in New Jersey and 221,300 New Jersey workers out of 2,061,266 who worked in New York.

In 1970 the number of New Yorkers commuting to New Jersey by highway was estimated by statistical basis at 44,401 which was a significant increase from the 31,202 estimated in the 1960 journey-to-work figures for highway travel.* 1980 census data is not available and apparently lags by some three to four years or so. Comparable data was attempted to be obtained by a National Analyst survey which polled ETT taxpayers as of 1980. That survey indicated 74,830 New Yorkers traveled by highway to New Jersey. This constituted 4.4% of the 1,686,481 highway commuters. It compares with 2.9% and 44,401 such commuters in 1970.

4.4% of the persons surveyed by National Analyst answered the survey by stating that they made no trips to New Jersey

* The 1960 Census indicated 1,573,904 people traveled by all modes of transportation to work in N.Y.-N.J. with about 85% being N.J. residents working in N.J.; 11.3% or 177,459 were N.J. residents commuting to N.Y.; and 3.5% N.Y. residents who commuted to work in N.J.

during 1979. This is perhaps inconsistent in light of the method of taking the survey. Whether this is factually so is unverified. Some people deliberately misanswer surveys. The 1980 estimated figures also show that the New Jersey to New York commuters accounted for 4.7% or 79,454 highway trips. The number of New Jersey commuters was estimated from sources other than the ETT survey.

In the 1960's and 1970's total expenditures for highways in the New Jersey metropolitan area and study area were close to $5,000,000,000.

As mentioned earlier, the State relied on two reports, one by Wilbur Smith and one by Simpson & Curtin.

Simpson and Curtin's approach was to determine the New Yorkers' total highway benefits by first determining the total costs attributable to the New York commuter and then establishing a benefit cost ratio. Under this analysis total ETT receipts equalled $380,634,000, while New York benefits came to $453,206,000. As with the Wilbur Smith report, the direction in which the commuter was traveling during the peak hours was irrelevant. It was only important that the commuter traveled during the peak hour.

Simpson & Curtin utilized data which included expenditures by local governments as well as by the State. Five categories of expenditures were analyzed over a 10-county study area:

1) Highway Right-of-Way and Construction;
2) Maintenance;
3) Police and Safety;
4) Highway Administration, and
5) Highway Debt Service.

Simpson and Curtin also included a compilation of State expenditures for mass transit during the study period. They next defined the 10-county study area and then allocated State expenditures to the area. First they noted that northern New Jersey had 75% of the expenditures during the 1960's and 1970's and contained 55% of the total route mileage within the State. The 55% was increased by 15% because the road width is greater in northern New Jersey by 20 to 25% than in south

Jersey. Finally another 15% was added since construction and maintenance costs for highways run 10-25% higher in the northern 10 counties, in part because of higher cost of living and union wage scales. Therefore, Simpson & Curtin allocated 75% of all State highway expenditures in the 1960's and 70% of the 1970 expenditures to the study area.

Proceeding to the five categories of study, Simpson & Curtin allocated 96% of highway construction and right-of-way costs to commuter travel, as well as 90% of the maintenance. (100% of the transit subsidies were allocated to commuters). This is based in part on the preceding calculations together with Mr. Curtin's testimony that highways are designed for the thirtieth highest hourly volume, which just happens to fall in the peak period. Defendant states that most of the highway network was built prior to the 1960's and what was needed in the 1960's and 1970's was merely the "widening and improving" of these roadways to accommodate the commuter.

The final step in the Simpson & Curtin report was to allocate the expenditures to the New York commuter. Utilizing a variety of sources, Simpson & Curtin determined that during the 1960's, 3% and during the 1970's 3.7% of all highway commuters were New York commuters. 15% of all bus commuters were said to be New York commuters since that percentage of buses left New York during the morning peak and arrived in New York during the evening peak hour period. Consequently, 15% of the operating and capital subsidies were allocated to the New York commuter, because "equipment utilization is the indicator of operating costs and not passengers carried." Total State transportation expenditures attributable to the New York commuter over the 20-year period were $255,299,111 or $182,973,042, omitting the federal assistance. Both numbers are significantly lower than the $380,634,000 in tax collected. Benefits to New York commuters totalling $453,206,000 are calculated pursuant to a benefit/cost ratio which adopts the "ratio of 2.0 for new construction . . . together with a lesser value of 1.5 for maintenance and police costs. The latter cost categories are in somewhat lower order benefit-wise, although their ratios should be greater than 1.0%."

Mr. Curtin testified, based on Port Authority figures, that the predominant traffic flow in the morning in the mid-Manhattan links are eastbound, while the Staten Island crossings predominantly are westbound in the morning rush hours. Highway use and utilization are determined by the relationship of peak volume to the capacity of the road at a particular time and this establishes the condition or level of service on the road. Mr. Curtin testified there are six levels of highway congestion, labeled A through F.

Mr. Curtin testified that $4,987,000,000 was spent from 1961 through 1980 by all units of government for right-of-way and road construction in New Jersey. However, the increase in route miles was only from 32,337 to 33,723. Of course, there was a greater increase in lane miles. Thus, the essential highway network had been constructed in New Jersey in the 1960's. Subsequent improvements and construction related to widening and improving of the roads to accommodate the increased traffic burden, particularly at peak hours.

The double-decking of the George Washington Bridge occurred in the 1960's resulting in a greater increase in volume on the New Jersey approach roads.

Construction costs are allocated among road users by taking the State total and then attributing 75% and 70% to derive the amount expended in the 10 north Jersey counties and then on the basis of volume capacity requirements of commuters, 96% of that aggregate cost was attributed to commuters for the years 1961 to 1980. The attributable capital *cost* to the New York based interstate commuters is thus 4%. This was on the ground that there was a very good network of roads in the northeastern metropolitan area in the 1960's which would have sufficed for travel, except for peak hours. Essentially, additional construction and widening was a function of the demand created by commuters. Therefore, the State attributed 100% of the land acquisition to road widening and 95% of the concrete earth work and other construction costs to commuter traffic. This resulted in aggregate capital expenditures attributed to New York based interstate commuters from 1961 to 1980 of $92,753,000. This includes not only federal money, but money

spent by State and local governments in northern New Jersey in the study area. If federal funds were excluded, the total would be $46,313,000.

Mr. Curtin allocated 90% to commuters on the basis that the majority of work and repairs are influenced primarily by the vehicular use, in that all work on the road has to be done to accommodate the commuter. The text of his report used 95% as allocable share of maintenance outlays. Thus, Table IV-6 shows that maintenance costs over the 1961-1980 period were $1,914,934,000 of which $66,073,000 were attributed to the New York-based interstate commuters. Using essentially the same formulas, 13.9 million dollars were allocated to New York-based commuters for police and safety; 14.8 million dollars for administration and miscellaneous expenses were allocated to New York-based commuters and 15.8 million dollars in bond interest and redemption were so allocated. The total allocated to New York-based interstate commuters as the estimate for the cost burden is approximately 203.3 million dollars on New Jersey roads and streets.

B

New York commuters were a factor in the Subsidy Program and add to the top of the peak approximately 4% in the case of railroads, approximately 5 or 6% for buses and 4 or 5% in the case of highways. The aggregate produces the peak problem.

Based on a middle-of-the-day level of service it appears likely that an economical operation could be run on buses and railroads on the fares alone.

The commuter is the principal customer of the bus system as well as the rail system. The volume of work commuters during the peak commuting hours is easily three to four times what it is at other times of the day. Peak period controls the demand.

All subsidy money paid by government in New Jersey to buses has been allocated by the State to commuters because they created the peak demand. Absent the work commuter and the peak hours, the bus service could be handled by 1/3 the number of buses, work force, etc.

Based on the number of buses servicing the New York commuters, the State has allocated 15% of the subsidy to the New York-based commuter. The operating subsidy attributed to New York-based interstate commuters was thus $11,385,000.

The large number of buses serve the peak and the components thereof (notwithstanding the greater number of New Jersey commuters). The New York commuters contribute to the need for the Subsidy Program in proportion to their numbers because trips back to New Jersey are necessary.

Plaintiffs contend that the demand is solely generated by the New Jersey commuter. Thus they argue that if the New York commuter were nonexistent, the buses would still have to return to New Jersey in any event and therefore the New York commuter should not be charged with any cost. However, this Court determines that the commuting body as a whole must be considered, thus making the commuter's particular direction irrelevant. Furthermore, Simpson and Curtin allocate to the commuters some portion of New Jersey transit riders (noncommuters) fares because without the commuters, no subsidies would be needed. Apparently, this portion is assessed to both New Jersey and New York commuters.

As to the interstate highway networks, it is obvious they were designed for various uses, including as standbys for national defense and emergencies. The construction and right-of-way costs are also attributable to the commuter. Portions of Interstate Routes 80, 78, 287 and 280 were constructed during the 20-year period between 1960 and 1980. The testimony is actually somewhat different than plaintiffs urge.

Plaintiffs also complain that the calculation of benefits in the Wilbur Smith report concluded that the New York commuter received benefits for highway construction and widening expenditures without regard to whether the highway improvements were open for use for all or any part of the period between 1961 and 1980. However, this argument is shortsighted and does not recognize that there are many construction costs incurred before a highway is open which result from planning, construction and improvement. The necessity is generated and must be funded prior to the actual use.

Also, since 1961 operating subsidies of $484,000,000 have been paid to the railroads with the greatest proportion allocated to those servicing New York City. Capital subsidies from 1969 to 1980 aggregate $385,000,000. On the Reading Seashore Line 3% and 3.85% for the 1960's and 1970's, respectively, or $14,578,000 of capital subsidy and $17,523,437 of operating subsidies are allocable to New York commuters.

Approximately $255 million of the State's expenditures have been allocated to the New York commuter. If federal funds were removed this figure would be reduced to approximately $183 million. Plaintiff argues that to include the federal funds would burden the New York commuter with actually paying double federal taxes. However, highway and transit users realize a benefit regardless of the source of funds and State and federal funding are inextricably intertwined. State contributions are required. Without the State share of expenditures the federal funds could not have been obtained. It is therefore appropriate to include federal funds.

Mr. Curtin testified, when asked what appears to be one of the ultimate questions for the finder of fact, *i.e.*, whether the New York commuter is *the* peculiar source of the transportation problem:

> I determined that the New York commuter is part of the cause of the transportation problem which is entirely a problem of commuter overload. Any increment that adds to that, adds to the overloading.

Mr. Strate of Wilbur Smith Associates, the State's other expert, stated that the New York commuter has an impact on the transportation problem since the "significant number" of trips made by these commuters adds to the amount of traffic.

Plaintiffs' experts, on the other hand, opined that not only were the New York commuters not *the* peculiar source of the commuter transportation problem, but that they were insignificant as a contributor to the transportation problem in New Jersey.

The New York commuters, even though about 4% of the commuting population between New York and New Jersey,

certainly add to the problem. They would not be *the* peculiar source of the problem. However, the New Jersey Supreme Court also had the figures before it, and acknowledged that the relative percentages of New York commuters were small compared to New Jersey commuters. 82 *N.J.* at 505. It did not strike down the tax, believing that there could still be a significant impact. If the Supreme Court did not invalidate the tax on this basis, this court should not do so, not only because it is bound by the Supreme Court decision, but also because the New York commuter adds to the peak and is a peculiar source of the problem. Our Supreme Court said:

> New York residents who commute to New Jersey contribute significantly to the excessive demands on New Jersey's transportation facilities in the New York-New Jersey area." [82 *N.J.* at 516]

This finding was made by the Supreme Court on the record before it. That same record, as supplemented, is now before this Court again. I am bound by the New Jersey Supreme Court's finding. While the State does have to demonstrate that the New York commuter is a peculiar source of the problem, the same standard as set forth in *Hicklin* does not necessarily govern. Supporting this conclusion is the fact that *Hicklin* dealt with an employment statute, while this Court has to determine the constitutionality of a tax statute. Furthermore, the problem in *Hicklin* was that non-residents were being barred from employment, while in *Salorio*, the non-residents are not being barred from employment or the State's facilities, but are being assessed a tax for the use of New Jersey's transportation system and network as New Jersey residents are being taxed in New York.

Because states possess great freedom in the area of taxation, *Madden v. Kentucky*, 309 *U.S.* 83, 60 *S.Ct.* 406, 84 *L.Ed.* 590 (1940), it follows that such a strict requirement cannot apply. The standard must be established somewhere between the commuters being the sole cause of the problem and an insignificant part of the problem. 82 *N.J.* at 505.

III

But the inquiry here does not end with a consideration of costs. User benefits must be considered in determining whether the ETT can withstand a constitutional challenge.

The court finds that the ratio of user benefits to cost is in the range of benefits of $2 to $4 for every $1 expended, whether on highway, bus or rail. Benefits take the form of reduced travel time, savings with respect to fuel, vehicle and tire wear, etc., and include accident reduction.

On behalf of the State, Mr. Curtin calculated the following aggregate *benefits* for highways attributed to New York-based interstate commuters for 1961 to 1980:

Capital Outlay	$185,506,000
Maintenance Cost	99,110,000
Administration Cost	26,584,000
Debt Service	31,542,000
Police & Safety Cost	20,852,000
	$363,594,000

Exact precision is obviously not possible in connection with this case. Not only did time restraints hamper the experts in their analysis and preparation of reports, but the magnitude of the undertaking and the costs involved caused the experts to base their conclusions on data that, for the most part, had already been compiled. Consequently, the transcript is replete with estimates, assumptions and likelihoods.

Total ETT taxpayers for 1980 equalled approximately 94,000, with 90,157 projected as actually commuting to New Jersey. The total amount of money collected during the twenty year life of the ETT is subject to some dispute. $492,161,923 was in fact paid by taxpayers, but $111,527,860 was diverted to the Property Tax Relief Fund (*N.J.S.A.* 54:8A-120) leaving a total in the ETT fund of $380,634,000. The State reaches its final conclusions based on this latter figure, while plaintiffs argue that the total amount paid by the New York commuter should be utilized. As the law presently exists, the New York commuter actually pays one tax, the ETT, from which the

commuter's New Jersey Income Tax is taken. *N.J.S.A.* 54:8A-119, *et seq.* If there were no ETT, the New York commuter would still have to pay New Jersey Income Tax. *See*, 82 *N.J.* at 500.

Plaintiffs' contend that the approximately $112 million transferred to the Property Tax Relief Fund based on the New Jersey Income Tax should be included in the base against which benefits are measured. New Jersey disagrees. The State's experts stated that they did not include that dollar amount in their analysis. The Supreme Court required the State to account for all money collected under the ETT. The money that went to the Property Tax Relief Fund, *N.J.S.A.* 54:8A-120, was specifically earmarked for that fund and was never used for transportation purposes. If the ETT were abolished today, the New York commuter would still have to pay New Jersey Income Tax, so not including the money transferred out of the ETT fund is logical. Therefore, the total funds collected attributable solely to the ETT which the State has to deal with is $308,634,000.

As observed, the State's experts utilized data supplied to them from numerous sources, and the plaintiffs' experts relied upon substantially the same information in reaching their conclusions—a good illustration of how to prove anything with statistics.

The difference between the two are their methods of analysis. The State utilized a benefit analysis theory, to which plaintiffs made continuing objection. While the remand opinion does not clearly set forth the exact type of analysis to be used, as noted, benefits have to be considered. See 82 *N.J.* at 506, 509, 517.

Plaintiffs argue, before attacking these calculations, that the State's benefit analysis is not appropriate to assess shares of costs to different shares of users. They argue that the theory is used almost exclusively for the calculation of alternative transportation improvements. The State urges that the benefit analysis can be used to evaluate the success of past projects. Plaintiffs are really quarrelling with the New Jersey Supreme Court's decision, and must do so in that forum. This Court is

bound by that decision and the benefit alternative is obviously available to the State. The question is whether the State has to demonstrate that the New Yorker's *share* of benefits are proportional to the tax payments made, or whether it need only be shown that the benefits the New York commuter receives warrant the tax payments he makes.

At the core of this dispute is the wording of the Supreme Court in the remand that evidence must be produced:

> . . . enabling the court to determine whether the tax imposed on non-residents charges them only for their share of the transportation problem they cause or the benefits they receive. [82 *N.J.* at 517.]

Additionally, the defendant must show the relation between interstate and intrastate use of New Jersey transportation systems. The accounting by the State need not consider either the $112 million transferred to the Property Tax Relief Fund, nor the motor fuels tax, property tax or federal tax paid by the New York commuter.

The State, relying on Wilbur Smith, determined benefits by considering the savings in costs attributable to each kind of highway improvement and from reduced fares and improved service on public transit. Defendant's other expert, Simpson & Curtin, determined costs of various improvements and translated these into benefits by use of an "historically accurate factor." Wilbur Smith found the benefits given to New York commuters over the 19-year life of ETT to be $904,232,000 expressed in terms of constant 1980 dollars (Exhibit D-3, Table 6-24). This amount was corrected to $701,754,000 (Exhibit D-19, Table 6-24). The ETT payments for this period expressed in 1980 dollars were said to be between $680-$816 million (Exhibit D-19, Table 6-24). Mr. Curtin had found the benefits to be $453,206,000, with $380,000,000 the amount of the tax paid, or excess benefits of $73,000,000.

The Wilbur Smith report looked at both highway and public transportation benefits. It assessed benefits to highway users due to reduction in their costs caused by highway improvements. Five types of highway improvements were considered:

New construction and widening; resurfacing; operational improvements; safety improvements; maintenance, drainage and structures. A principal highway network was utilized as representative of the roads upon which most New York commuters would travel on their way to work. This was computed in part based on zip codes of New Jersey employers of New York commuters. The roads selected included toll roads, although toll roads were not included when calculating benefits. The State also utilized an ETT survey which indicated the point of entry into New Jersey and the zip code of the New York commuter's destination. "Centroids" were established which estimated designation points in certain areas. By expanding the amount of benefits attributable to the principal highway network by 1.87, Wilbur Smith included roads other than those in the principal highway network because there is a strong "likelihood" that the New York commuter would have to leave the principal highway network to get to work. This figure is on the conservative side because it takes into account only the "work trip portion" and not other "midday" or "auxiliary" trips.

Using this starting point, benefits to the New York highway commuter were determined by: the cost to the commuter to run his vehicle on the highways before improvements are performed; the extent of the specific improvement, and a calculation of user costs after the improvement.

Plaintiffs attack the method of analysis on various fronts. Plaintiffs' initial reason is that the principal highway network was determined before the responses to the ETT questionnaire were received. However, this Court is satisfied from viewing the principal highway network that the major roads were included and, therefore, there was no need to await the return of the survey. Plaintiffs have failed to demonstrate that the outcome would be any different because of this factor. The two instances listed in Plaintiffs' Post Trial Brief are not determinative. One is based on their expert's speculation, and while the other instance alludes to a cobblestone road being utilized, the testimony in fact states that the cobblestone exists in "front of the Post Office."

Plaintiffs argue that even the defendant's witnesses did not establish that the New York commuters constitute the peculiar source or the major cause of the transportation problems in northern New Jersey. It is clear that they do in fact exist and are severe. *See also*, 82 *N.J.* at 516.

The Court accepts the 1.87 expansion figure used by the State. It is likely in almost all instances that the New York commuter would have to leave the major highway network to arrive at or leave his place of employment. The number of trips made, rather than vehicle miles, was considered. The sum of $118,830,000 is accepted in that it takes into account corrections referred to earlier and utilizes an appropriate expansion factor.

Total benefits of resurfacing allocated to New York commuters over the 20 year period amounted to $246,381,200. The commuter was experiencing a savings in operating costs due to resurfacing. The comparison was between driving on smooth pavement versus badly broken asphalt. The Court accepts the uncontradicted testimony of a 40% savings due to repaving.

True, the benefits attributable to New York commuters are greater than the actual repaving costs. Obviously, one dollar spent on repaving can yield more than that one dollar in benefits. The Court can take notice that the Corps of Engineers uses such a cost-benefit analysis. The benefits derived are those attributable to higher operating costs of the vehicle if the road was not repaved.

Operational improvements were calculated as $19,795,210 (corrected). Plaintiffs argue that this figure should be no more than $7 million. However, those arguments are not persuasive.

Safety benefits are $14,524,000. Maintenance, drainage and structures produced highway user benefits of $98,268,000. Such benefits included clearing storm drains, pothole repairs and snow plowing.

The daily operating cost was put at $115,524. Plaintiffs claim this figure is off by $20,000 because of inclusion of non-existent intersections and mathematical errors, thus overstating benefits by $60 million. The point concerning the intersections appears well taken. Apparently, defendant con-

cedes the mathematical miscalculations. However, plaintiffs arrived at a $60 million reduction based on their position that the 1.87 expansion factor is improper. The Court finds that the actual reduction should be $40 million, giving a total maintenance benefit to New York commuters of $58,268,144.

Wilbur Smith attributes $628,518,000 in total highway benefits to New York commuters for the years 1961-1980. Based on the Court's review this figure is reduced to $576,518,000.

While the Court is not compelled to follow either a cost or a benefit analysis, or a proportional or incremental analysis, the benefit analysis is as a practical matter more appropriate for discussion. Peak hours of traffic then become important only to the extent of defining the roads and the study area.

Plaintiffs criticize the Wilbur Smith report on calculations computing the benefits and the ETT payments in 1980 dollars. Plaintiffs argue that different bases were used in calculating benefits and payments. Table 6-25 of the Wilbur Smith report shows that the ETT *payments* were converted to 1980 dollars by the use of the consumer price index and a 10% compounding factor. *Benefits*, however, were converted to 1980 dollars using the construction composite price index. If the same items were being compared the *same* conversion factor would have to be used on each side of the equation. If this were done, then the total ETT payments cited in the Wilbur Smith report would be off by approximately $20 million. However, we are measuring different factors and there is also a certain intangible aspect to the concept of "benefits."

Apart from highway benefits, benefits from public transportation also are considered. 82 *N.J.* at 509. Until 1977, all ETT payments were used to subsidize rail and buses. Benefits to the captive transit rider, that person who generally speaking rides public transportation regardless of an increase in fare or decrease in subsidy, are $27,687,000 over the 20-year period, as estimated by Wilbur Smith. Next are considered the benefits flowing from the State's expenditures for operating and capital subsidy, based on the savings attributable to riding public transportation rather than private automobile. Finding that it would be cheaper to utilize one's own car, Wilbur Smith

allocated no benefits to this category. The final category of benefits used is Indirect Highway User Benefit. Basically this is a benefit to present highway users who would have increased operating costs due to the added vehicular congestion if the subsidies for public transportation were terminated. The 20-year benefits amounted to $45,549,000.

Plaintiffs challenge the indirect user benefits (as opposed to those for the captive rider), claiming the State is:

1) Speculating as to what would occur if the subsidies were terminated;

2) Not taking into account "negative benefits" (an anomalous term), and

3) Assessing $45 million in benefits to New York commuters for not having to deal with the increase in traffic even though the majority of increased auto commuters would probably be New Jerseyites heading in the opposite direction.

The State responds that if bus and train subsidies were to stop, 1,260 New York to New Jersey bus riders and 1,150 New York to New Jersey train commuters would be added to New Jersey highways, while 21,700 New Jersey to New York commuters would be added. The $45 million in benefits are attributable to *present* New York highway commuters who do not presently have to contend with that additional burden.

Three thousand buses are used for the peak hours. Those that take New Jersey commuters to New York return either in service or "deadhead." Many of the buses returning to New Jersey in service have anywhere from 50% to 75% empty seats. The deadhead buses, those that return directly to the garage, incur less expense than scheduled trips because the number of stops is drastically reduced and they can go the most direct route. However, many of the basic operating costs (*e.g.*, drivers' salaries, tolls and fuel) remain substantially the same. Plaintiffs contend that the buses are required to service the New Jersey commuter and that the New York commuter poses no additional cost to the bus lines, or at the very least only about 2% of contract bus trips. Of course, the existence of the buses serves to benefit the New York commuter.

The "negative benefits" to which plaintiffs refer concern the finding by Wilbur Smith that it would be cheaper for some transit riders to use their own cars to get to work rather than the subsidized transit system. I do not find that such is actually the fact. There are obviously other factors involved such as increased insurance rate costs, tolls, wear and tear, parking fees, etc. To plaintiffs' way of thinking the transit commuter thus suffers a detriment, or a negative benefit, which should be offset against benefits. However, there are other "personal preference" reasons why persons would ride public transit rather than utilizing the interstate highway network. This is not taking into account whether the New York commuter owns or uses a car. Car ownership in New York may not be as universal as elsewhere.

Defendant correctly declines to include negative benefits. Surely the transit rider would not continue to ride public transportation if only such economics were involved. However, such personal preferences that keep the public transit rider loyal to the system are probably impossible to calculate.

Benefits for the bus system attributed to New York-based interstate commuters were calculated from 1970 through 1980 as capital *benefits* of $17,088,000 and operating benefits of $17,076,000, for a total of $34,164,000.

Total benefits for the rail system attributed to New York-based interstate commuters from 1961 through 1980 were capital benefits of $29,160,000; operating benefits of $26,288,000 and total *benefits* of $55,448,000.

Thus, the total highway *benefits* attributable to New York-based commuters were $363,594,000 (highway); $34,164,000 (bus) and $55,448,000 (rail) for total transportation benefits of $453,206,000. This compared with $380,634,000 collected (net) under the ETT. On this computation benefits exceeded the tax by $73,572,000.

The summary and conclusions of the Simpson & Curtin report noted that the spread of improved highways, complemented by tax supported bus and rail networks made possible a significant increase of 20 to 25% in jobs over the past two decades which benefited New York as well as New Jersey

residents. There has been an exodus from New York City for various reasons, including inadequate transportation facilities, deteriorating roads, antiquated subway system, and the tax structure.

The number of commuters in the area has risen from 1.57 million in 1960 to about 2.26 million in 1980 for an increase of 44%. The percent of New York to New Jersey commuters has increased 64% from 55,049 trips in 1960 to 90,157 trips in 1980, recognizing the imprecision of statistics.

There appears to be no doubt that the critical transportation problem exists and will continue to exist into the future, without prospect of abatement. Highway improvements seem to generate added use which almost immediately outdates the improvement in the area. The State argues that it is impossible to tell whether the word "share" modifies transportation problems or benefits. The Court clearly wanted the State to demonstrate the commuters' share of either the problems or the benefits.

The Supreme Court indicated that: "Travel figures must also take into account the substantial amount of intrastate use of all facilities funded." 82 *N.J.* at 509. The State must demonstrate the use of the transportation facilities by New Jersey commuters who work in New Jersey so that the appropriate share of costs or benefits can be allocated to the ETT taxpayer.

Plaintiffs also contend that under other contributions to be considered, 82 *N.J.* at 507-508, motor fuel taxes, property taxes and federal taxes paid by the New York commuter have to be figured into the defendant's "accounting." Plaintiffs contend that if they are considered, then the New York commuter has paid revenues to the ETT far in excess of any benefit received. The State argues, however, that since the Supreme Court did not consider the residents' payments of property tax and sales tax, then it is unfair to include the New Yorkers' payments of these taxes. But, the remand opinion did not exclude these taxes *per se*. There defendant was arguing that since residents pay a higher percentage of *those* taxes, substantial equality is attained by the New York commuters paying their share under the ETT. The Court rejected that argument,

finding that the discriminatory nature of the ETT could not be offset merely because residents pay more total tax dollars. Comparison of different taxes is "inappropriate unless its scope is restricted to collections for transportation services. . . ." 82 *N.J.* at 507. The remand opinion states that:

> To sustain the tax, there must be a showing that the impact of ETT on non-residents, along with their other contributions *for public transportation expenses*, is substantially offset by the benefits they receive from transportation services. [82 *N.J.* at 507-508] (Emphasis added.)

The proofs do not show that property and sales taxes fit this category and hence they should not be considered. The motor fuels tax is somewhat different. By statute, proceeds collected pursuant to this tax are to be expended for transportation projects. *N.J.S.A.* 54:39-71, *et seq.* Despite this, the State argues that the tax is not "dedicated," since the appropriation laws include that tax in the State's general fund and therefore those funds can be allocated for any State purpose under the annual appropriation act. Approximately $260 million was collected pursuant to this tax during the 1970s.

Plaintiffs argue that most New York commuters utilizing this State's highways would buy their gas in this State. Obviously, this would not meet all their gas requirements. Although there may be some logic to this, based on a gas price disparity, there is no way that can be proved, and certainly on this record and merely on opinion. I find it was not proved.

The State did not consider this tax in its accounting. The money collected under the motor fuels tax was placed in the State's general fund. As such, the tax is not "restricted for transportation services," and, therefore, cannot be appropriately considered here.

IV

This Court cannot accept Mr. Curtin's statement that a loaded truck and a single auto cause the same wear upon the road. That is contrary to common sense and federal studies. His reasoning was that every highway built in this State was

meant to accommodate truck traffic. The Comptroller General's Report states that a legally loaded tractor-trailer truck "has the same impact on an interstate highway as at least 9,600 cars." In addition to the Comptroller, anyone with common knowledge or who travels Routes 4, 17 or 80 can easily appreciate the striking difference between those roads and roads without heavy truck traffic such as the Garden State Parkway. But although he has a false premise with respect to maintenance, it is not trucks which are a primary cause of the problem at issue. They add to it to some extent. Consequently, Simpson & Curtin's allocation of 90% of the maintenance cost to commuter traffic is unrealistic, although in the real world the exact amount which should be allocated cannot be done on a direct proportion. Curtin also considered trucks when determining the commuter's share of construction costs and found 4% attributable to the trucks. This figure may also be modest depending on whether you view it from the standpoint of volume or impact.

Plaintiffs contend that the State's allocation of 70-75% of State expenditures to the study area is erroneous. This conclusion is reached based on the lower figures contained in Wilbur Smith and DOTNJ data, 48% and 62% respectively. Another reason for plaintiff's conclusion is that the Simpson & Curtin report fails to include higher land and construction costs upon which Curtin relied when testifying as to the basis for the 70-75% figure. These arguments are rejected.

Finally plaintiffs challenge defendant's contention that higher costs are found in the northern counties, because the evidence submitted at trial, if taken on a per capita basis, would show costs which are allegedly higher in the less densely populated counties. Plaintiffs argue that highest New Jersey State Highway expenditures per capita were made in the sparsely populated counties while lesser amounts per capita have been spent in the counties where most of the New York commuters are employed. Obviously, this points out a fallacy of using statistics, and on a per capita basis. The extremely high density of population in northern New Jersey obviously distorts the figures. The Court could take judicial notice that

densities per square mile in some municipalities of Hudson County, for example, are in the neighborhood of 20,000 to 40,000 people per square mile, while the southern New Jersey counties and municipalities have generally much lower densities. This is just another illustration of the maxim, "You can prove anything with statistics." Obviously a mile of road at a fixed cost placed anywhere in the world will vary in per capita cost depending on population density. Likewise, similar anomalies can be illustrated if area comparisons are made. Warren County has the highest amount of dollars per capita expended, while Bergen County has the lowest. But absolute dollars is a different matter.

The State also correctly points out that it is inappropriate to compare Wilbur Smith data with Simpson & Curtin data for a variety of reasons:

1) Wilbur Smith used a nine-county area while Simpson & Curtin used a ten-county area;

2) Categories of expenditures are different, and

3) Wilbur Smith data did not include expenditures by county as did Simpson & Curtin data.

Exact correlations cannot be made. As has been noted, our Supreme Court has recognized that there is imprecision in this area.

As to the interstate highway network, it is obvious it was designed for various uses, including a standby for national defense and emergencies. The construction and right-of-way costs are also attributable to the commuter. Portions of Interstate Routes 80, 78, 287 and 280 were constructed during the 20-year period between 1960 and 1980. The testimony is actually somewhat different than plaintiffs urge.

The defendant's burden has been met under the benefit approach essentially as set forth in the Wilbur Smith testimony and report. Wilbur Smith has supplied sufficient evidence to allow the Court to uphold the ETT as constitutional. Even though the report's calculations had to be revised for a number of reasons, the total payments under the ETT by New York

commuters (irrespective of New Jersey's income tax) are "substantially proportionate to the total benefit they derive by virtue of State expenditures for all types of commuter facilities." 82 *N.J.* at 506.

As stated by Justice Pashman, ". . . the nature of the field of taxation requires judicial tolerance of imperfections in legislative schemes." *Salorio v. Glaser, supra*, at 516. Neither mathematical equality of impact, 82 *N.J.* at 516, nor mathematical certainty, 82 *N.J.* at 517, are required. Furthermore, and as observed, the New Jersey Supreme Court has already recognized that:

> New York residents who commute to New Jersey contribute significantly to the excessive demands placed on New Jersey's transportation facilities in the New York-New Jersey area. [82 *N.J.* at 516].

The burden of the ETT on New York commuters is substantially commensurate with the benefit they derive from their use of New Jersey's transportation facilities. I conclude that the State has proved that nonresident New York commuters are a peculiar source of the transportation problem in the New York-New Jersey metropolitan area. I find that this is a substantial reason for any existing discrimination and it bears a substantial relationship to the commutation problems generated by the local transportation emergency. This disparate treatment is justified within the framework of the existing statute.

It has not been proven in the record of this case by any measurable or sufficient competent evidence that such "commuters have provided funds *for highway purposes* in any other manner during the entire life of the ETT" to any appreciable extent. 82 *N.J.* at 506, n.21. Something more is needed than bald assertions and speculation.

Accordingly, the Emergency Transportation Tax is declared constitutional and not violative of the Privileges and Immunities Clause. The Complaint is dismissed.

The attorney for defendant will submit an appropriate order.

APPENDIX C

Judgment of the Superior Court of New Jersey, Chancery Division, filed July 13, 1983

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY

CIVIL ACTION

DOCKET NO. C-3628-76

JOHN SALORIO, ROBERT COE and JOHN D. MCGARR, JR.,

Plaintiffs,

—VS.—

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Defendant.

JUDGMENT

This matter initially having come before this Court upon Complaint filed June 8, 1977, and this Court having rendered judgment which was partially vacated by the Supreme Court of New Jersey by opinion dated March 26, 1980 and, pursuant to said opinion, the matter having been remanded to this Court and tried before this Court on May 11, 12, 13, 18 and 19, 1981, and this Court having rendered judgment dated October 26, 1981, which judgment was reversed by the Supreme Court of New Jersey by opinion dated June 8, 1983, and, pursuant to said opinion, the matter having been remanded to this Court for entry of judgment in accordance therewith;

IT IS on this 13th day of July, 1983, hereby adjudged and declared for the reasons set forth in the aforementioned opinion of the New Jersey Supreme Court dated June 8, 1983 that:

(1) The New Jersey Emergency Transportation Tax Act, L. 1961, c. 32 as amended, *N.J.S.A.* 54:8A-1 *et. seq.* is unconstitutional as violative of the Privileges and Immunities Clause of the United States Constitution, Article IV, § 2, cl. 1; and

(2) The plaintiffs are not entitled to reimbursement of any monies withheld, collected or due with respect to income earned prior to January 1, 1984 pursuant to the New Jersey Emergency Transportation Tax Act; and

(3) The effective date of that portion of this judgment declaring the New Jersey Emergency Transportation Tax Act unconstitutional shall be January 1, 1984 and the defendant shall be and hereby is enjoined from enforcing the New Jersey Emergency Transportation Tax Act with respect to income earned on or after January 1, 1984.

/s/ Sherwin D. Lester, J.S.C.
SHERWIN D. LESTER, J.S.C.

The undersigned attorneys hereby consent to the form of the within Order.

IRWIN R. KIMMELMAN
Attorney General of New Jersey
Attorney for Defendant

By: Michael R. Cole
MICHAEL R. COLE
Assistant Attorney General

Dated: June 28, 1983

CONNELL, FOLEY & GEISER
Attorneys for Plaintiffs

By: Kevin J. Coakley
KEVIN J. COAKLEY

Dated: June 21, 1983

APPENDIX D

New Jersey Emergency Transportation Tax (Commuter Income Tax), 54 N.J. Stat. Ann. §§ 8A-1 to 8A-57 (West Supp. 1983)

CHAPTER 8A. COMMUTERS INCOME TAX

[Article 1. Emergency Transportation Tax]

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54:8A-3. "Resident" defined.
54:8A-4. "Derived from sources within" defined.
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* * *

[ARTICLE 1, EMERGENCY TRANSPORTATION TAX]

* * *

54:8A-1. *Short title*

This act shall be known and referred to by its short title, the "emergency transportation tax act." L.1961, c.32, p.126, § 1.

54:8A-2. *Imposition of tax; levy; collection; payment; exemption*

A temporary emergency tax is hereby imposed, and shall be levied, collected and paid annually, at the rates specified in this act;

(a) Upon every resident of this State, who is not a resident of another critical area state under and pursuant to its laws, upon and with respect to the entire state under and pursuant to its laws, upon and with respect to the entire net income as defined in this act and subject to taxation under this act, for the taxable year, derived from sources within a critical area state other than New Jersey; and

(b) Upon and with respect to the entire net income as defined in this act and subject to taxation under this act, for the taxable year, derived from sources within this State by natural persons who are not residents of this State and who are residents of another critical area state under and pursuant to the law of such state.

(c) Notwithstanding the foregoing, for taxable years beginning on or after January 1, 1972 no tax shall be payable under section 6(c) (C.54:8A-6(e)) by:

(1) Any person individual whose entire gross income for the taxable year is $2,500.00 or less, provided such individual is not married nor the head of a household nor a surviving spouse;

(2) Any head of a household or surviving spouse whose entire gross income for the taxable year is $5,000.00 or less; and

(3) Any husband or wife whose entire gross income for the taxable year, determined jointly, is $5,000.00 or less, or the aggregate of whose gross income for the taxable year, determined separately, is $5,000.00 or less.

L.1961, c. 32, p. 126, § 2. Amended by L.1961, c. 129, p. 755, § 1, eff. Dec. 22, 1961; L.1970, c. 304, § 1; L.1972, c. 12, § 1; L.1973, c. 244, § 1, eff. Nov. 21, 1973.

54:8A-3. *"Resident" defined*

The word "resident" applies only to natural persons and includes any person domiciled in the State, except a person who, though domiciled in the State, maintains no permanent place of abode within the State, but does maintain a permanent place of abode without the State, and who spends in the aggregate not to exceed 30 days of the taxable year within the State. In addition, it includes any person who maintains a permanent place of abode within the State and spends in the aggregate more than 183 days of the taxable year within the State, whether or not domiciled in the State during any portion of said period, and such a person shall be taxed the same as

though he had been domiciled in the State during the entire taxable year. However, it does not include a person in the Armed Forces of the United States, whether in a land, sea or air service or any auxiliary corps or guard thereof, during any period when individuals are liable for induction for training and service under applicable law, if not domiciled in the State notwithstanding his maintenance of a permanent place of abode within the State and his spending an aggregate of more than 183 days in the State.

L. 1961, c.32, p. 126, § 3, as amended L. 1962, c.70, § 1.

54.8A-4. *"Derived from sources within" defined*

"Derived from sources within" 1 State or another, as applied to entire net income, means such income and gain from all property owned and from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, and from all business, trade, professional or occupation carried on, in the particular State. No person who is not a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall be deemed to carry on a business, trade, profession or occupation in a State solely by reason of the purchase and sale of property for his own account. L.1961, c.32, p. 127, § 4, as amended L.1961, c. 129, p. 755, § 2.

54:8A-5. *"Critical area state" defined; legislative findings; certification of state highway commissioner; publication*

(a) "Critical area State" means this State and such other State bordering thereon within which there exists part of an area, another part of which is in this State, and within which area there is, as of January 1 of any year, a critical transportation problem in respect to the transportation of persons and property interstate.

(b) The Legislature finds and declares that a critical transportation problem exists in connection with transportation

interstate between this State and another State bordering thereon when there is such number of daily commuters between said States as to create a severe peak-load demand requiring facilities and services, by any means or mode of transportation far in excess of those needed for normal travel outside of usual commuter hours, caused by the carrying on of activities in 1 of the States by persons residing in another, from which activities such persons derive income or gain from sources within the State other than that in which they reside. The Legislature further finds and declares that whenever the aggregate number of persons, residing in each of such States who are employed, or carry on a trade, business, occupation or profession in the other, exceeds 100,000, that fact reasonably indicates that a critical transportation problem exists.

(c) Within 40 days after the taking effect of this act, and within 40 days after the first day of each year hereafter so long as this act shall remain in effect, the State Highway Commissioner shall certify to the State Treasurer his findings with respect to the existence of the conditions herein set forth and the identity of any States which he determines to come within the definition in this section. Upon receipt of such certification, the State Treasurer shall cause public notice thereof to be given, by publication in such newspaper or newspapers, and in such form, as he shall find will fairly apprise all persons subject to taxation under this act, of the making of said certification and of the significance thereof to such persons. Any certification so made shall be effective for the entire calendar year as of the first day of which it ascertains the facts. L.1961, c 32, p. 127, § 5.

54:8A-6. *Rates; computation of tax upon entire net income*

(a) (Deleted by amendment.) P.L.1972, c. 12.

(b) For taxable years ending after December 31, 1971 through and including those ending in 1977, the tax imposed by this act upon entire net income shall be computed at the following rates:

On such of the amount as exceeds	*But does not exceed*	*The tax is*
$0	$ 1,000	2%
1,000	3,000	$20 plus 3% of excess over $ 1,000
3,000	5,000	80 plus 4% of excess over 3,000
5,000	7,000	160 plus 5% of excess over 5,000
7,000	9,000	260 plus 6% of excess over 7,000
9,000	11,000	380 plus 7% of excess over 9,000
11,000	13,000	520 plus 8% of excess over 11,000
13,000	15,000	680 plus 9% of excess over 13,000
15,000	17,000	860 plus 10% of excess over 15,000
17,000	19,000	1,060 plus 11% of excess over 17,000
19,000	21,000	1,280 plus 12% of excess over 19,000
21,000	23,000	1,520 plus 13% of excess over 21,000
23,000	25,000	1,780 plus 14% of excess over 23,000
25,000		2,060 plus 15% of excess over 25,000

(c)(1) For taxable years ending after December 31, 1977 through and including those ending in 1978, the tax imposed by this act upon entire net income shall be computed at the following rates:

On such of the amount as exceeds	*But does not exceed*	*The tax is*
$0	$ 1,000	2%
1,000	3,000	$20 plus 3% of excess over $ 1,000
3,000	5,000	80 plus 4% of excess over 3,000
5,000	7,000	160 plus 5% of excess over 5,000
7,000	9,000	260 plus 6% of excess over 7,000
9,000	11,000	380 plus 7% of excess over 9,000
11,000	13,000	520 plus 8% of excess over 11,000
13,000	15,000	680 plus 9% of excess over 13,000
15,000	17,000	860 plus 10% of excess over 15,000
17,000	19,000	1,060 plus 11% of excess over 17,000
19,000	21,000	1,280 plus 12% of excess over 19,000
21,000	23,000	1,520 plus 13% of excess over 21,000
23,000	30,000	1,780 plus 14% of excess over 23,000
30,000		2,760 plus 15% of excess over 30,000

(2) For taxable years ending after December 31, 1978, the tax imposed by this act upon entire net income shall be computed at the following rates:

On such of the amount as exceeds	*But does not exceed*	*The tax is*
$0	$ 1,000	2%
1,000	3,000	$20 plus 3% of excess over $ 1,000
3,000	5,000	80 plus 4% of excess over 3,000
5,000	7,000	160 plus 5% of excess over 5,000
7,000	9,000	260 plus 6% of excess over 7,000
9,000	11,000	380 plus 7% of excess over 9,000
11,000	13,000	520 plus 8% of excess over 11,000
13,000	15,000	680 plus 9% of excess over 13,000
15,000	17,000	860 plus 10% of excess over 15,000
17,000	19,000	1,060 plus 11% of excess over 17,000
19,000	21,000	1,280 plus 12% of excess over 19,000
21,000	23,000	1,520 plus 13% of excess over 21,000
23,000		1,780 plus 14% of excess over 23,000

(d)(1) For each taxable year beginning in 1977 and ending in 1978 two tentative taxes shall be computed, the first as provided in subsection (b) and the second as provided in subsection (c)(1), and the tax for such year shall be the sum of that portion of each tentative tax which the number of days in 1977 and the number of days in 1978, respectively, bears to the number of days in the entire taxable year.

(2) For each taxable year beginning in 1978 and ending in 1979 two tentative taxes shall be computed, the first as provided in subsection (c)(1) and the second as provided in subsection (c)(2), and the tax for such year shall be the sum of that proportion of each tentative tax which the number of days in 1978 and the number of days in 1979, respectively, bears to the number of days in the entire taxable year.

(e) For taxable years beginning on or after January 1, 1972, the tax imposed by section 9 of P.L.1970, c. 304 (C. 54:8A-6.1) on minimum taxable income, as defined in section 10 of P.L.1970, c. 304 (C. 54:8A-6.2) shall be at the rate of 6%.

L.1961, c. 32, p. 128, § 6. Amended by L.1968, c. 59 § 1, eff. June 11, 1968; L.1970, c. 304, § 2; L.1972, c. 12, § 2; L.1978, c. 131 § 1, eff. Oct. 18, 1978.

54:8-6.1. *Minimum income tax on minimum taxable income of each individual*

In addition to the tax imposed under section 2 (C. 54: 8A-2), a minimum income tax determined in accordance with the rate set forth in subsection (e) of section 6 (C. 54:8A-6) is hereby imposed for each taxable year on the minimum taxable income of every individual.

L.1970, c. 304, § 9 supplementing P.L.1961, c. 32. Amended by L.1973, c. 244, § 3; eff. Nov. 21, 1973.

54:8A-6.2. *Minimum taxable income*

(a) The minimum taxable income shall be the sum of the items of tax preference, as described in subsection (b) of this section, reduced (but not below zero) by the aggregate of the following:

(1) The applicable specific deduction described in subsection (c) of this section;

(2) The tax determined under subsection (c) of section 6 of P.L.1961, c. 32 (C. 54:AA-6) for the taxable year, reduced by the sum of the credits allowable under subsection b. of section 7 of P.L. 1978, c. 131 (C. 54:8A-15.1); and

(3) To the extent that the sum of the items of tax preference exceeds the applicable specific deduction described in subsection (c) of this section plus the tax described in paragraph 2 above, the amount of any net operating loss of the taxpayer, determined as provided in subsection (b)(5) of section 35 (C. 54:8A-35), which remains as a net operating loss carryover to a succeeding taxable year. In such case, however, the amount of such net operating loss used to reduce the sum of the items of tax preference shall be treated as an item of tax preference in the next succeeding taxable years, in order of time, to the extent that such net operating loss carryover reduces taxable income.

(b) For purposes of this act, the term "items of tax preference" shall mean the federal items of tax preference, as defined in the laws of the United States, derived from or connected with New Jersey sources, for the taxable year, with the modifications as may be prescribed by regulations of the Division of Taxation which relate to income derived from or connected with New Jersey sources.

(1) The federal items of tax preference for amortization of certified pollution control facilities shall be excluded from the computation of items of tax preference with respect to industrial waste treatment facilities and air pollution control facilities which qualify.

(2) The federal items of tax preference with respect to depletion shall be excluded from the computation of items of tax preference.

(3) The federal item of tax preference for capital gains shall be computed by subtracting from such tax preference item an amount sufficient (if necessary) to reduce such tax preference item to 60% of net capital gains.

(4) The federal item of tax preference for adjusted itemized deductions shall be computed as if the required reduction of federal adjusted gross income by the amount of the tax-payer's federal deduction for state and local taxes did not include any amount includible as a modification reducing federal itemized deductions pursuant to subparagraph (A) of paragraph (2) of subsection (b) of section 37 of P.L.1961, c. 32 (C. 54:8A-37).

(c) Specific deduction. An amount which bears the same ratio to $5,000.00, or $2,500.00 in the case of a married individual filing a separate return, as his items of tax preference computed under subsection (b) of this section bear to his total federal items of tax preference.

(d) (Deleted by amendment.) P.L.1972, c. 12, section 3. L.1970, c. 304, § 10, supplementing P.L.1961, c. 32. Amended by L.1972, c. 12, § 3; L.1973, c. 244, § 4, eff. Nov. 21, 1973; L.1978, c. 131, § 4, eff. Oct. 18, 1978; L.1981, c. 374, § 5, eff. Dec. 30, 1981.

54:8A-6.3. *Tax surcharge*

(a) In addition to the taxes imposed by sections 6(c) (C. 54:8A-6(c)) and 6(e)(C. 54:8A-6(e)), there is hereby imposed on the income of every taxpayer for the taxable years ending after December 31, 1971 and commencing on or before December 31, 1976 a tax at the rate of 2-1/2% of the taxes imposed under sections 6(c) (C. 54:8A-6(c)) and 6(e) (C. 54:8A-6(e)) before the deduction of any credits against tax allowable for such year except with respect to the tax credit allowed under section 16 (C. 54:8A-16).

(b) Provided, however, that for each taxable year beginning in 1971 and ending in 1972, a tentative tax shall be computed as provided in subsection (a) except that the tax imposed under section 2 (C. 54:2A-2) shall be computed in accordance with the rates set forth in subsection 6(c) thereof; the additional tax imposed under this section for such year shall be that proportion of such tentative tax as the number of days in 1972 bears to the number of days in the entire taxable year.

(c) Provided further that for each taxable year beginning in 1976 and ending in 1977, a tentative tax shall be computed as provided in subsection (a) hereof and the additional tax imposed under this section for such year shall be that proportion of such tentative tax as the number of days in 1976 bears to the number of days in the entire taxable year.

(d) Notwithstanding the provisions of subsection (a) of this section, the tax imposed by such subsection shall not apply for taxable year ending after December 31, 1972 and commencing before January 1, 1975, provided further that for each taxable year beginning in 1972 and ending in 1973, a tentative tax shall be computed as provided in subsection (a) and the additional tax imposed under this section for such year shall be that proportion of such tentative tax as the number of days in 1972 bears to the number of days in the entire taxable year. Provided further that for each taxable year beginning in 1974 and ending in 1975, a tentative tax shall be computed as provided in subsection (a) and the additional tax imposed under this

section for such year shall be that proportion of such tentative tax as the number of days in 1975 bears to the number of days in the entire taxable year.

L.1972, c. 12, § 9. Amended by L.1973, c. 244, § 5, eff. Nov. 21, 1973. L.1974, c. 187, § 1, eff. Dec. 24, 1974.

54:8A-6.4. *Maximum tax rate on personal service income*

(a) If for any taxable year beginning in 1978 and thereafter an individual has personal service entire net income which exceeds the amount of entire net income specified in paragraph (1) of this subsection, the tax determined pursuant to subsection 6(c) of P.L.1961, c. 32 (C. 54:8A-6(c)) for such year shall be the sum of:

(1) The tax determined by subsection 6(c) of P.L.1961, c. 32 (C. 54:8A-6(c)) on the highest amount of entire net income on which the rate of tax does not exceed 12%,

(2) 12% of the amount by which his personal service entire net income exceeds the amount of entire net income specified in paragraph (1) of this subsection, and

(3) The excess of the tax determined under section 6(c) of P.L.1961, c. 32 (C. 54:8A-6(c)), without regard to this section, over the tax so determined with reference solely to his personal service entire net income.

(b) For purposes of this section the term "Personal Service Income" means items of income includible as personal service income for purposes of section 1348 of the Internal Revenue Code; provided, however, that notwithstanding the provisions of such section of the Internal Revenue Code to the contrary with respect to the filing of returns by married individuals, the provisions of this section of this act shall be applicable in the case of a husband and wife who file separate New Jersey tax returns (whether or not on a single form).

(c) The personal service entire net income of an individual is the excess of:

(1) The amount which bears the same ratio (but not in excess of 100%) to his entire net income as his personal service gross income bears to his entire gross income, over

(2) The sum of his items of tax preference, as defined in this act, other than the item of tax preference for capital gains, for the taxable year.

For purposes of paragraph (1) of this subsection, the term "personal service gross income" means personal service income reduced by any deductions allowable under section 62 of the Internal Revenue Code which are properly allocable to or chargeable against such personal service income.

L.1978, c. 131, § 6, eff. Oct. 18, 1978. Amended by L.1979, c. 437, § 1, eff. Feb. 14, 1980; L.1981, c. 374, § 6, eff. Dec. 30, 1981.

54:8A-7. *Gross income defined; manner of computing*

The term "gross income" means the total of a taxpayer's gains, losses, profits and income derived from sources within his source State. Gross income shall be computed in accordance with the provisions of section 32 or section 36 of this act. In computing gross income, the items of gain, loss, profit or income set forth in section 33 of this act shall not be included except to the extent provided therein.

For the purpose of applying the deductions permitted in sections 9 and 37 of this act, gross income computed in accordance with the provisions of section 32 of this act shall be reduced by the amount of the deduction allowed in section 35(a) of this act. L.1961, c. 32, p. 129, § 7, as amended L.1961, c. 129, p. 756, § 3.

54:8A-8. *"Taxpayer" defined*

"Taxpayer" means any person subject to a tax imposed by this act, or whose income is in whole or in part subject to a tax imposed by this act, and does not include corporations. L.1961, c. 32, p. 129, § 8, as amended L.1962, c. 70, § 2.

54:8A-9. *Standard deduction*

(a) Any taxpayer may elect to deduct 10% of his gross income, or $1,000.00, whichever is less, in lieu of all deduc-

tions otherwise permitted under this act. The deduction provided for by this section shall become known as the "standard deduction."

For taxable years beginning in 1971, the standard deduction shall be 13% of gross income or $1,500.00, whichever is less; for taxable years beginning in 1972, the standard deduction shall be 14% or $2,000.00, whichever is less; for taxable years beginning in 1973 the standard deduction shall be 15% or $2,000.00, whichever is less; and for taxable years beginning in 1978 the standard deduction shall be 16% or $2,400.00, whichever is less; and for taxable years beginning in 1981 and thereafter the standard deduction shall be 17% or $2,500.00, whichever is less.

A husband and wife shall not be entitled to a standard deduction in an amount greater than one computed on their aggregate gross income, whether they file separate or joint returns. If they file separate returns, neither may elect the standard deduction unless the other also so elects. If both so elect, either may take such deduction, or they may divide it; except that for taxable years beginning in 1971 the standard deductions shall be 13% of gross income or $1,500.00, whichever is less: for taxable years beginning in 1972 the standard deduction shall be 14% or $2,000.00, whichever is less; for taxable years beginning in 1973 the standard deduction shall be 15% or $2,000.00, whichever is less; for taxable years beginning in 1978 the standard deduction shall be 16% or $2,400.00, whichever is less; and for taxable years beginning in 1981 and thereafter the standard deduction shall be 17% or $2,500.00, whichever is less.

Such election may be changed for a taxable year after the filing of the return, subject to regulations issued under this act. If a taxpayer wishing to make such change has a spouse who filed a separate return, the change shall not be allowed unless (1) such spouse also makes a change consistent with the change desired by the taxpayer and (2) both consent in writing to the assessment of any additional tax resulting from such change without regard to time limits otherwise preventing such assessment.

(b) Minimum New Jersey standard deduction. For taxable years beginning in 1978 and thereafter:

(1) The New Jersey standard deduction of an individual who is not married nor the head of the household nor a surviving spouse shall be the amount determined under subsection (a) of this section or $1,400.00, whichever is greater, except that for taxable years beginning in 1981 and thereafter the minimum amount shall be $1,500.00;

(2) The New Jersey standard deduction of a husband and wife whose New Jersey taxable income is determined jointly, or of the head of a household, or of a surviving spouse, shall be the amount determined under subsection (a) of this section or $1,900.00, whichever is greater, except that for taxable years beginning in 1981 and thereafter the minimum amount shall be $2,000.00; and

(3) The aggregate New Jersey standard deductions of a husband and wife whose New Jersey taxable incomes are determined separately shall be the amount determined under subsection (a) of this section or $1,900.00, whichever is greater, except that for taxable years beginning in 1981 and thereafter the minimum amount shall be $2,000.00 and such standard deductions may be taken by either or divided between them as they may elect.

L.1961, c. 32, p. 129, § 9. Amended by L.1961, c. 129, p. 756, § 4; L.1962, c. 70, § 3; L.1970, c. 304, § 3; L.1972, c. 12, § 4; L.1978, c. 131, § 2, eff. Oct. 18, 1978; L.1981, c. 374, § 1, eff. Dec. 30, 1981.

54:8A-10. *Exemptions from net income*

(a) Each taxpayer is allowed the following exemptions with respect to net income:

For each taxpayer, $650.00; for the taxpayer's spouse, if taxpayer does not file a joint return and if such spouse has no gross income for the eligibility year and is not a dependent of another taxpayer, an additional $650.00; for each taxpayer who is at least 65 years of age or over at the close of his taxable year, an additional $650.00, and for taxpayer's spouse under

the same conditions and if the initial $650.00 exemption is allowable, an additional $650.00; for each taxpayer who is blind at the close of his taxable year, an additional $650.00, and for taxpayer's spouse under the same conditions and if the initial $650.00 exemption is allowable, an additional $650.00. Blindness shall be deemed to exist when central visual acuity in the better eye does not exceed 20/200 with correcting lenses, or when the widest diameter of the visual field subtends an angle of not more than 20 degrees;

For each dependent whose entire gross income for the eligibility year is less than $750.00, or who is taxpayer's child or stepchild and has not attained age 19 at the close of the eligibility year or is a student: $650.00.

For taxable years beginning in 1979, such exemption shall be $700.00, for taxable years beginning in 1980 such exemption shall be $750.00, and for taxable years beginning in 1982 and thereafter such exemption shall be $800.00.

With respect to all taxable years beginning on or after January 1, 1973, if (1) the taxpayer's gross income as defined in section 7 of P.L.1961, c. 32 (C. 54:8A-7), is exceeded by (2) his entire gross income by more than $100.00, his exemptions allowed in this section shall be limited by the percentage which (1) is of (2). The manner for determining a taxpayer's entire gross income shall be provided by regulation. Such regulations may authorize the use of federal adjusted gross income for this purpose.

(b) Husband and wife. For a husband and wife who have elected to file separate New Jersey returns on a single form pursuant to section 44(b) of P.L.1961, c. 32 (C. 54:8A-44(b)), the limitation under subsection (a) of this section shall be determined by reference to (1) their total New Jersey gross incomes and (2) the combined entire gross income of the husband and wife. L.1961, c. 32, p. 130 § 10. Amended by L.1961, c. 129, p. 757, § 5; L.1970, c. 304, § 4; L.1973, c. 244, § 2, eff. Nov. 21, 1973; L.1978, c. 131, § 3, eff. Oct. 18, 1978; L.1981, c. 374, § 2, eff. Dec. 30, 1981.

54:8A-11. *"Dependent" defined*

"Dependent" means any individual related to taxpayer, over half of whose support (exclusive of any amount received by a child or stepchild as a scholarship for study at an educational institution) for the eligibility year was received from the taxpayer, in fact or constructively. No person may be claimed as a dependent by any taxpayer if such person has filed a joint return with his or her spouse. L.1961, c. 32, p. 131, § 11, as amended L.1961, c. 129, p. 757, § 6.

54:8A-12. *"Related to taxpayer" defined*

"Related to taxpayer" means related by blood, to the extent of any lineal descendant or ancestor of taxpayer, other children or grandchildren of a parent of taxpayer, children of a grandparent of taxpayer, and grandchildren of a grandparent of taxpayer who are receiving institutional care for physical or mental disability and who had been members of taxpayer's household prior to institutionalization; or related by marriage, to the extent of a stepchild, stepparent, stepbrother or stepsister of taxpayer, the parents, brother or sister of the spouse of the taxpayer, or the spouse of a child of taxpayer; or related by household, to the extent of a person having taxpayer's home as his principal place of abode and being a member of taxpayer's household for the taxable year. Brothers and sisters of the half blood shall be regarded as though of the whole blood. L.1961, c. 32, p. 131, § 12, as amended L.1961, c. 129, p. 758, § 7.

54:8A-13. *Dependent; claim by person contributing more than ten per cent of support*

An individual receiving over half of his support for the eligibility year from persons who would be entitled to claim him as a dependent except that no one of them contributed over half of such support, may be claimed as a dependent by any one of such persons who contributed over 10% of such support, provided that all other such persons execute written declaration, to be filed with the return of the person making

the claim, not to claim the same dependent for the eligibility year of each of them. L.1961, c. 32, p. 131, § 13.

54:8A-14. *"Eligibility year" defined*

"Eligibility year" means the calendar year in which the taxable year of the taxpayer begins. L.1961, c. 32, p. 131, § 14.

54:8A-15. *Repealed by L.1972, c. 12, § 10*

54:8A-15.1 *Household, and household and dependent care services necessary for gainful employment credits*

a. *Household credit*

(1) For taxable years beginning on and after January 1, 1978, a credit shall be allowed against the tax imposed by subsection 6(c) of P.L.1961, c. 32 (C. 54:8A-6(c)). The credit, computed as defined in paragraph (2) of this subsection, shall not exceed the tax imposed by subsection 6(c) of P.L.1961, c. 32 (C. 54:8A-6(c)) for the taxable year, reduced by the credits permitted under subsection (b) of this section and section 16 P.L.1961, c. 32 (C. 54:8A-16).

(2) The amount of the credit allowed pursuant to this subsection for taxable years beginning prior to January 1, 1982, shall be determined in accordance with the following table:

If the household gross income is	*The credit shall be*
Less than $5,000.00	$65.00
$5,000.00 but less than $6,000.00	$50.00
$6,000.00 but less than $7,000.00	$40.00
$7,000.00 but less than $25,000.00	$35.00

The amount of the credit allowed pursuant to this subsection for taxable years beginning in 1982 and thereafter shall be determined in accordance with the following table:

If the household gross income is	*The credit shall be*
Less than $5,000.00	$70.00
$5,000.00 but less than $6,000.00	$55.00
$6,000.00 but less than $7,000.00	$45.00
$7,000.00 but less than $25,000.00	$40.00

(3) For the purposes of this subsection:

(A) "Household gross income" shall mean the aggregate entire gross income of a household, as the term household is defined in subparagraph (B) of this paragraph, for the taxable year, plus the aggregate entire minimum taxable income of that household.

(B) "Household" means a husband and wife, a head of a household, a surviving spouse, or an individual who is not married nor the head of a household nor a surviving spouse nor a taxpayer with respect to whom a deduction under subsection (e) of section 151 of the Internal Revenue Code is allowable to another taxpayer for the taxable year.

(C) "Household gross income of a husband and wife" shall be the aggregate of their entire gross incomes for the taxable year plus the aggregate of their minimum taxable incomes irrespective of whether joint or separate tax returns are filed. Provided, however, that a husband or wife filing a separate New Jersey tax shall be permitted one-half of the credit otherwise allowed his or her household, except as limited by paragraph (1) of this subsection.

(D) "Household gross income" shall be computed in all cases to reflect the entire gross income from all sources of each member of the household for the entire taxable year.

(E) If a taxpayer changes his status during his taxable year from resident to nonresident, or from nonresident to resident, the household credit shall be prorated to reflect the period that the taxpayer was subject to any tax under this act. In the case of a husband and wife, if either or both changes his or her status from resident to nonresident or from nonresident to resident and separate returns are filed, the credit computed for the entire year shall be divided first as provided in subparagraph (C) of this paragraph and then prorated according to each period that the taxpayer was subject to tax under this act.

b. *Credit for certain household and dependent care service necessary for gainful employment*

(1) For taxable years beginning on and after January 1, 1977, a taxpayer shall be allowed credit, to be computed as hereinafter provided, against the tax imposed by subsection

6(b) or 6(e) of P.L.1961, c. 32 (C. 54:8A-6(b) or 6(c)) of this act. Except as provided below, the amount of the credit shall be 20% of the credit allowed such taxpayer pursuant to the provisions of section 44A of the Internal Revenue Code for the same taxable year. The amount of such credit shall not exceed the tax imposed by subsection 6(b) or 6(c) of P.L. 1961, c. 32 (C. 54:8A-6(b) or 6(c)), as may apply, of this act, for the taxable year, reduced by the credit permitted under section 16 of P.L. 1961, c. 32 (C. 54:8A-16).

(2) In the case of a husband and wife who file a joint federal return, but who elect to determine their New Jersey taxes separately, the credit allowed pursuant to this subsection may only be applied against the tax imposed on the spouse with the lower entire net income computed without regard to such credit.

(3) Any taxpayer who is otherwise eligible to take the credit permitted by this subsection shall be permitted to take the full amount of such credit except that if (a) his gross income, as defined in section 7 of P.L. 1961, c. 32 (C. 54:8A-7), is exceeded by (b) his entire gross income by more than $100.00, his credit shall be limited to the amount which represents the same percentage of the total allowable credit which (a) is of (b).

For a husband and wife whose federal taxable income is determined on a joint return but whose New Jersey entire net incomes are determined separately on a single form, the limitation contained in this subparagraph shall be determined by reference to (a) the total of their gross incomes as defined in section 7 of P.L. 1961, c. 32 (C. 54: 8A-7) and (b) the joint entire gross income they would be required to report if both were determining their tax on their joint entire gross income.

L.1978, c. 131, § 7, eff. Oct. 18, 1978. Amended by L.1981, c. 374, § 7, eff. Dec. 30, 1981.

54:8A-16. *Credits for tax imposed by another critical area state*

(A) (1) A nonresident of this State shall be allowed a credit against the tax otherwise due under this act for any income tax

imposed for the taxable year by another critical area State, of which the taxpayer is a resident but such credit shall not exceed either:

(a) the percentage of the other tax determined by dividing the portion of the taxpayer's income subject to taxation under this act which is also subject to the other tax by the total amount of his income subject to such other tax, or

(b) the percentage of the tax otherwise due under this act, determined by dividing the portion of the taxpayer's income subject to taxation under this act which is also subject to the other tax by the total amount of the taxpayer's income which is taxable under this act.

(2) No credit shall be allowed under this section unless the jurisdiction of which the taxpayer is a resident:

(a) grants a substantially similar credit to residents of this State, or

(b) imposes an income tax on its own residents with respect to income derived from this State, and exempts from income tax the income of residents of this State.

(B) A resident of this State shall be allowed a credit against the tax otherwise due under this act for any income tax imposed for the taxable year by another critical area State, upon income both derived therefrom and subject to tax under this act.

(1) The credit allowable under this subsection shall not exceed the percentage otherwise due under this act determined by dividing the portion of the taxpayer's income subject to taxation by such other jurisdiction by the total amount of the taxpayer's income subject to taxation under this act.

(2) The credit allowable under this subsection shall not reduce the tax otherwise due under this act to an amount less than would have been due if the income subject to taxation by such other jurisdiction were excluded from the taxpayer's income subject to tax under this act.

(3) No credit shall be allowed under this subsection for a tax of a jurisdiction which allows residents of this State a credit against the taxes imposed by such other jurisdiction for the tax

under this act, if such other credit is substantially similar to the credit granted to nonresident taxpayers by subsection (A) of this section. L.1961, c. 32, p.132, § 16, as amended L. 1961, c.129, p.758, § 9; L.1962, c.70, § 4.

54:8A-17. *Withholding tax*

From and after the first day of the first month following at least a full calendar month after the enactment of this act, every employer in this State of a taxpayer subject to tax in respect of wages, salaries or commissions derived from sources within this State shall deduct and withhold upon the same for each payroll period an amount computed in such manner as to result, as far as practicable, with due regard to the personal exemptions and standard deduction allowable under this act, in withholding during each calendar year a sum substantially equivalent to the amount of tax reasonably estimated to be due under this article. Methods for determining the amount to be withheld shall be prescribed by regulation, as shall procedures and requirements for the furnishing of written exemption certificates to the employer, the amending or substitution of the same, the furnishing by the employer of written statements showing the total compensation, the amount withheld and other specified information. L.1961, c. 32, p. 132, § 17.

54:8A-18. *Payment of tax; returns; extension of time*

With respect to each taxpayer, the tax imposed by this act shall be due and payable annually hereafter, in the manner provided in this section:

(a) Every taxpayer shall annually pay the tax imposed by this act with respect to all or any part of each of his fiscal or calendar accounting years beginning after January 1, 1961, to be computed as in this act provided, for such fiscal or calendar accounting year or part thereof, on a return which shall be filed, in the case of a taxpayer reporting on a calendar year basis, on or before April 15 following the close of such calendar year, or, in the case of a taxpayer reporting on a fiscal

year basis, on or before the fifteenth day of the fourth month following the close of such fiscal year, and the full amount of the tax shall be due and payable on or before the date prescribed herein for the filing of the return.

(b) Every taxpayer shall pay a like tax with respect to all or any part of the period beginning January 1, 1961 and extending through any subsequent part of its first fiscal or calendar accounting year ending after said date, to be computed as in this act provided, for such period, on a return which shall be filed on or before April 1, 1962, and the full amount of the tax shall be due and payable on or before the date prescribed herein for the filing of the return.

(c) Each return shall carry a certificate signed by the taxpayer to the effect that all statements contained therein are true, under the same penalties as for perjury committed. Blank forms of return shall be furnished on application, but failure to secure the form shall not relieve any taxpayer of the obligation of making any return herein required. Subject to regulations under this act and in such form as may be indicated thereby, taxpayers whose net income taxable under this act is or may be subject to tax under a similar law of another jurisdiction may be permitted to file a simple, short form return attached to a copy of his return as filed or about to be filed by him in such other jurisdiction.

Subject to regulations under this act, reasonable extensions of time for good cause shown, may be granted for not more than 6 months unless exceptional circumstances justify a longer period, within which returns may be filed.

In addition, persons in active service with the Armed Forces of the United States, who may be prevented by distance or injury or hospitalization arising out of such service, may be allowed such extension of time for the filing of returns, without interest or penalty, as may be fixed by regulations under this act. L.1961, c. 32, p. 133, § 18, as amended L.1961, c. 129, p. 759, § 10; L.1962, c. 70, § 5.

54:8A-19. *Assignment of claim for refund of money paid or withheld in other jurisdiction*

(a) Every resident of this State who is subject to tax in some other jurisdiction for income and gains derived from sources within such other jurisdiction, which jurisdiction grants to residents of this State a credit substantially similar to that allowed to non-residents of this State by section 16(A) of this act, and who is subject to tax under this act and who has made payment on the estimated amount of such tax, or who has, in such jurisdiction, been subject to deduction and withholding of money, otherwise payable to him, for the purpose of crediting the same to the payment of such tax, shall be entitled to satisfy his obligation to pay the tax due under this act by entering into an agreement with the division, in such form and containing such provisions as may be fixed by regulation, which shall constitute an assignment and transfer to the State of New Jersey of the chose in action consisting of his claim for refund of moneys so paid or deducted and withheld, as well as an agreement to pay to the division so much of any refund as may be received by him as equals the tax under this act, within such period, to be not longer than one month after receipt by him of any such refund, as may be fixed by regulation; and for said purposes shall execute, deliver and file such document or documents, in such form, in such place or places and at such times as may be provided by regulation; and upon the making of any such assignment the State of New Jersey shall thereupon become the owner and holder of any such claims and shall be entitled to assert the same in its own right and as its own property, whether it asserts the same in its own name or in the name of the assigning taxpayers or otherwise.

In the event that the amount so paid or deducted and withheld, and received by the State of New Jersey pursuant to such agreement, shall exceed the amount necessary to satisfy the obligation of taxpayer under this act, the excess shall be repaid to taxpayer upon application therefor in accordance with procedures and forms fixed by regulation.

Every taxpayer exercising any option under this subsection shall be obliged to cooperate fully in any proceedings which

may be taken for recovery of the claim for refund, and for that purpose shall execute and deliver such papers, affidavits, forms or other documents, shall appear and be available to give testimony at such place or places and at such time or times, shall furnish such information, shall permit the institution of such proceeding or proceedings in his name or otherwise, but at the sole cost and expense of the State, and do all other things, as the division shall deem appropriate or desirable for the effective recovery of any sum due and payable on such claim.

The provisions of this subsection shall not apply to any tax, or to any payment or deduction and withholding for the satisfaction of the same, imposed by any Federal law.

(b) If it shall appear to the satisfaction of the division, based upon an opinion of the Attorney General of this State, that any residents of this State, or class of residents of this State who are subject to the tax imposed by this act, are liable for tax upon the same income under the law imposed for the taxable year by another critical area State and are thereby entitled to the credit allowed by section 16(B) of this act against the tax otherwise due under this act and that said credit is substantially sufficient to offset the taxes imposed hereunder, the division may by regulation relieve such residents or class of residents from being required to make any return under this act. L.1961, c. 32, p. 134, § 19, as amended L.1962, c. 70, § 6.

54:8A-20. *Transportation fund; purposes; authorization to use*

(a) All moneys which shall be received by way of tax or by way of moneys deducted and withheld under this act, shall be kept in a special fund, to be known as the Transportation Fund, separate and apart from all other funds, and the moneys in such fund at any time shall be used only for 1 or more of the following purposes, within the limits of available appropriations made by law from time to time:

(1) to meet the expenses of administering the provisions of this act and of the regulations made hereunder and the expenses of any proceedings or actions involving the same;

(2) to defray the cost of, or to provide financing by way of advances, loans or otherwise for, projects and programs to meet transportation problems, whether such transportation be by motor vehicle, by rail or rapid transit, or by any other mode or vehicle of transportation whatever, when such project or program includes the transportation of persons or property interstate, between the State of New Jersey and the source State, from which States taxpayers derive income or gain subject to tax under this act, and for the furnishing of such other facilities, services or other benefits for which the class of taxpayers covered by this act will be the major eligible recipient and for which the tax imposed by this act may reasonably be exacted, as may be authorized by law from time to time;

(3) to make payment of refunds to taxpayers entitled to receive the same;

(4) to make payment to another State of moneys deducted and withheld from its residents subject to tax hereunder in lieu of and in satisfaction of credits to which such residents may be entitled under the reciprocity clause contained in this act, whenever such State provides by or pursuant to its law.

(b) Funds in the Transportation Fund may not be used for any purpose except upon:

(1) presentation to the Attorney General of an itemization of the purposes for which funds are proposed to be used, stating the amount of each such proposed expenditure, which presentation shall be made by:

(A) The Director of the Division of Taxation, in the case of any purpose other than those described in subsection (a)(2) hereof, or

(B) The State Highway Commissioner in the case of any purpose described in said subsection (a)(2), and upon,

(2) transmittal of such itemization by the Attorney General to the State Treasurer, with a certification by the Attorney General endorsed thereon that the purposes for which funds are therein proposed to be used are within the terms and intent of the act and are otherwise in compliance with law. L.1961, c. 32, p. 135, § 20, as amended L.1961, c. 129, p. 761, § 11.

54:8A-21. *Endowment fund; investment; use*

So much of the moneys as may be in the Transportation Fund at any time and as may be in excess of the amounts needed to meet anticipated uses thereof pursuant to this act during any fiscal year, shall be held and accumulated as an endowment fund, and may be invested and reinvested from time to time in the same manner as any State funds may be invested, and the income thereof, as well as so much of the principal as may be necessary from time to time, shall be applied to the purposes authorized for the said Transportation Fund, within the limits of available appropriations. L.1961, c. 32, p. 136, § 21.

54:8A-22. *Misapplication of funds; right to refund*

In the event that any part of the moneys in the Transportation Fund shall, at any time, be applied to a purpose or purposes other than one set forth in this act, every taxpayer who shall have been subject to the tax imposed by this act and who shall have paid the same, shall thereupon be entitled to a refund, or to a credit against taxes subsequently accruing, equal to his pro rata share of the amount so applied, disregarding any amounts less than $1.00. Upon application made within 1 year after it shall be determined that any such moneys have been so applied, in such form and by such procedure as may be provided by regulation, the division shall determine the pro rata share of each taxpayer according to the following formula: (a) multiply the total amount of taxes paid by the taxpayer for all taxable years from the enactment hereof to July 1 of the year in which the right to refund arises under this section, by the dollar amount of the moneys determined to have been applied to a purpose other than one set forth in this act; then (b) divide the product by the total amount paid by all taxpayers, during the same period; then (c) from the quotient strike off any amount less than $1.00 to obtain the sum to be refunded or credited. If the amount so applied to another purpose shall have been determined by a court of competent jurisdiction, the amount so determined shall be used in the

computation otherwise, the division shall make determination of the amount. L.1961, c. 32, p. 136, § 22.

54:8A-23. *"Source state" defined*

"Source State" means, in the case of residents of this State, a critical area State other than the State of New Jersey; and in the case of non-residents of this State who are residents of another critical area State, the term means the State of New Jersey. L.1961, c. 32, p. 137, § 23.

54:8A-24 to 54:8A-28. *Repealed. L.1962, c. 70, § 12. Eff. June 5, 1962*

54:8A-29. *Taxable year; annual accounting period; calendar year; fiscal year; definitions*

(a) The term "taxable year" means

(1) the taxpayer's annual accounting period, if it is a calendar year or a fiscal year;

(2) the calendar year,

(A) if the taxpayer keeps no books, or

(B) the taxpayer does not have an annual accounting period, or,

(C) the taxpayer has an annual accounting period, but such period does not qualify as a fiscal year; or

(3) the period for which the return is made, if the return is made for a period of less than 12 months.

(b) The term "annual accounting period" means the annual period on the basis of which the taxpayer regularly computes his income in keeping his books.

(c) The term "calendar year" means a period of 12 months ending on December 31.

(d) The term "fiscal year" means a period of 12 months ending on the last day of any month other than December. L.1961, c. 32, p. 140, § 29, as amended L.1961, c. 129, p. 771, § 17.

54:8A-30. *"Partnership" defined*

"Partnership" includes all forms of unincorporated organization other than an estate or trust or a corporation, through or by means of which any business, financial operation or venture is carried on or liquidated. L.1961, c. 32, p. 140, § 30.

54:8A-31. *Partnership liability; inclusions in gross income*

(a) Individuals carrying on business in partnerships shall be liable for tax under this act only in their individual capacity. Each partner shall include in his gross income his distributive share, whether distributed or not, of the partnership's net income and net loss for the taxable year, or, where his taxable year is different, then for the taxable year of the partner in which ends the taxable year of the partnership.

(b) If a partner shall compute his gross income in accordance with section 32 of this act, he shall be entitled to take the deductions set forth in section 35(a) of the act. If such a partner's entire interest is sold, exchanged or liquidated, his distributive share of such income, gain or loss shall be included in his taxable year in which ends the partnership period ending with such transaction. Under this subsection, a partner's death does not constitute such liquidation.

Payments made in liquidation of the interest of a partner who retires or dies shall be taxed as a sale or exchange of such partner's interest in partnership assets, to the extent that they represent such interest, and the balance shall be taxed as the partner's distributive share of partnership income. Under this subsection, amounts paid for unrealized receivables or good will of the partnership shall not be included in payments representing a partner's interest in partnership assets except to the extent that the partnership agreement provides for payment with respect to good will.

(c) If a partner shall compute his gross income in accordance with the provisions of section 36 of this act, he shall not be entitled to take the deductions set forth in section 35(a) of this act.

(d) In determining the extent to which a partner's distributive share is derived from sources within his source State, no effect shall be given to a provision in the partnership agreement which

(1) characterizes payments to the partner as being for services or for the use of capital, or

(2) allocates to the partner, as income or gain derived from sources outside his source State, a greater proportion of his distributive share of partnership income or gain than the ratio of partnership income or gain derived from sources outside his source State to partnership income or gain from all sources, except as authorized in subsection (e), or

(3) allocates to the partner a greater proportion of a partnership item of loss or deduction derived from sources within his source State than his proportionate share of partnership loss or deduction from all sources, except as authorized in subsection (e).

(e) The Division of Taxation may adopt regulations to authorize the use of such other methods of determining a partner's portion of partnership item derived from sources within his source State, and the modifications related thereto, as may be appropriate and equitable to insure that only that portion of a partner's distributive share derived from sources within his source State shall be included within such share. L.1961, c. 32, p. 141, § 31, as amended L.1961, c. 129, p. 772, § 18.

54:8A-32. *Computation of gross income of taxpayer*

Except as otherwise provided in this act or by regulations pursuant to this act, a taxpayer shall compute his gross income by totaling his gains, losses, profits and income derived from salaries, wages or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property of whatever nature, growing out of the ownership or use of or interest in such property; also from interest, rent, royalties, dividends, securities, or the transaction of any busi-

ness carried on for gain or profits and income derived from any source whatever within the source State, including prizes and awards (other than those primarily in recognition of some achievement in the arts, sciences or public interest without active entry by the recipient and without requirement that he render substantial future services as a condition), or gains or profits or income derived through estates or trusts by the beneficiaries thereof, whether as distributed or distributive shares. In any case, the term "gross income" shall include capital gains or capital losses only to the extent provided in section 39 of this act. L.1961, c. 32, p. 141, § 32, as amended L.1961, c. 129, p. 773, § 19.

54:8A-33. *Income derived from sources within taxpayer's source state; exclusions from gross income*

(a) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from sources within the taxpayer's source State only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in his source State.

(b) Compensation paid by the United States for service in the Armed Forces of the United States, performed by an individual during an induction period, shall not constitute income derived from sources within his source State.

(c) There shall be excluded from gross income all amounts received:

(1) as a pension or retirement allowance,

(2) under a life insurance contract payable by reason of death,

(3) under a workmen's compensation act for personal injuries or sickness,

(4) through accident and health insurance for personal injuries or sickness except to the extent that such amounts are paid by or are attributable to contributions by the employer,

(5) by gift, bequest, devise or inheritance,

(6) which constitute wages or payments in lieu of wages for a period during which the employee is absent from work on account of personal injuries or sickness; but this subsection shall not apply to the extent that such amounts exceed a weekly rate of $100.00. This shall not apply to amounts attributable to the first 30 calendar days in such period, if such amounts are at a rate which exceeds 75% of the regular weekly rate of wages of the employee. If amounts attributable to the first 30 calendar days in such period are at a rate which does not exceed 75% of the regular weekly rate of wages of the employee, the first part of this subsection shall not apply to the extent that such amounts exceed a weekly rate of $75.00, and shall not apply to amounts attributable to the first 7 calendar days in such period unless the employee is hospitalized on account of personal injuries or sickness for at least 1 day during such period.

(d) In the case of a taxpayer who computes his gross income in accordance with the provisions of section 36, income and other amounts excluded from gross income under the provisions of this section shall be excluded only to the extent that such income and amounts would otherwise be included in Federal adjusted gross income. L.1961, c. 32, p. 142, § 33, as amended, L.1961, c. 129, p. 774, § 20; L.1964, c. 279, § 1.

54:8A-34. *"Net income" defined*

The term "net income" means the gross income of a taxpayer less the deductions allowed by this act. L.1961, c. 32, p. 142, § 34.

54:8A-35. *Computation of net income; deductions*

(a) In the computation of net income, the taxpayer may deduct from gross income the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business; the ordinary and necessary nonbusiness or nontrade expenditures paid or incurred for the production or collection of income which, if and when realized, will be

required to be included in income for the purpose of taxation under this act, or for the management, conservation or maintenance of property held for the production of such income but such deductions from gross income are allowable only if, and to the extent that, they are connected with income arising from sources within taxpayer's source State and taxable under this act.

(b) The taxpayer may also deduct from his gross income, in lieu of his standard deduction:

(1) Deductions for charitable contributions as defined in section 37(b)(4) but limited to his source State or to any political subdivision thereof, or any corporation, trust, community chest, fund, foundation or other entity organized or operated under the laws of his source State;

(2) Deductions for alimony or separate maintenance payments includible in the gross income of a recipient subject to tax under this act;

(3) Deductions for losses of real or tangible personal property having an actual situs in his source State, arising from fire, storm, shipwreck or other casualty, or from theft, shall be allowed only to the extent that the amount of loss to an individual arising from each casualty, or from each theft, exceeds $100.00. For purposes of the $100.00 limitation, a husband and wife making a joint return for the taxable year in which the loss is allowed as a deduction shall be treated as one individual.

(4) Deductions, with respect to real or tangible personal property having an actual situs in his source State, for losses (other than capital losses) incurred in any transaction entered into for profit but not connected with the taxpayer's trade for business; and

(5) Deductions determined under regulations of the Division of Taxation to be connected with his gross income, except deductions for income taxes imposed by this State or any other taxing jurisdiction. L.1961, c. 32, p. 143, § 35, as amended L.1961, c. 129, p. 775, § 21; L.1964, c. 279, § 2.

54:8A-36. *Computation of gross income from federal adjusted gross income figure*

(a) The Legislature hereby finds and determines that to permit taxpayers under this act to compute their gross income for tax purposes from the federal adjusted gross income figure used in their tax returns to the Federal Government will reduce the cost and simplify the administration of this act, and will simplify the preparation of State income tax returns by taxpayers. The Legislature further finds and determines that such method of computing gross income will not materially reduce and may increase the amount of revenue derived with respect to this act; and therefore, directs that each taxpayer be permitted, as an alternative to the method prescribed by section 32 of this act, to compute his gross income as provided in subsection (b) of this section.

(b) A taxpayer computing his gross income under the provisions of this subsection shall:

(1) Determine the net amount of income, gain, loss and deduction entering into his federal adjusted gross income for the taxable year which is derived from sources within his state, including:

(A) His distributive share of partnership income, gain, loss and deduction derived from sources within his source state, and

(B) His share of estate and trust income, gain, loss and deduction derived from sources within his source State.

(2) Add to such amount the following types of income and gain derived from the sources of income and gain listed below:

(A) Interest income from the obligations of any state or political subdivision thereof except where, by the laws of such state, its own taxpayers are exempted from taxation with respect to such interest income, subject to the provisions of section 33;

(B) Interest or dividend income from the obligations or securities of any authority, commission or instrumentality of

the United States, which the laws of the United States exempt from federal income taxation, but not from State income taxation, subject to the provisions of section 33;

(C) Amounts deductible with respect to income taxes imposed by this State or any other taxing jurisdiction in determining federal adjusted gross income unless such amounts are credited against federal income tax; and

(D) Amounts deductible with respect to interest on indebtedness which is incurred or continued in order to purchase or retain securities or obligations the income from which is exempt from tax under this act, subject to the provisions of section 33;

(E) In the case of a taxpayer who has deducted 1/5 a percentage of a net capital gain pursuant to section 1202 of the Internal Revenue Code, the excess (if any) of the amount so deducted over 60% of such net capital gain;

(3) Subtract from such net amount the following types of income and gain derived from the sources of income and gain listed below:

(A) Interest income from obligations of the United States and its possessions to the extent that such interest is includible in gross income for federal income tax purposes;

(B) Interest or dividend income from the obligations or securities of any authority, commission or instrumentality of the United States, to the extent that such amounts of income are includible in gross income for federal income tax purposes, and exempt from State income taxation under the laws of the United States;

(C) Interest or dividend income from obligations or securities to the extent that such income is exempted from taxation by the laws of this State authorizing the issuance of the underlying obligations and securities and includible in gross income for federal income tax purposes;

(D) The amount of any refund or credit for overpayment of income taxes imposed by this State or any other taxing jurisdiction, to the extent that such refund is includible in gross income for federal income tax purposes.

(4) There may be provided by regulation such modifications as shall be necessary to insure that only that portion of the taxpayer's federal adjusted gross income which is derived from sources within his source state shall be included in his gross income for purposes of this act.

(c) A taxpayer who computes his gross income in accordance with the provisions of this section shall not be entitled to the deductions set forth in section 35(a) but, in lieu of the standard deduction, shall be permitted the deductions in sections 35(b) and 37 of this act.

(d) The amount of the gross income of a taxpayer computed in accordance with the provisions of this section shall be conclusively presumed by the Division of Taxation to be the same as such taxpayer's gross income would have been if computed in accordance with the provisions of section 32 except that if the amount of a taxpayer's federal adjusted gross income or federal items of tax preference is changed or corrected by the taxpayer or the United States Internal Revenue Service or other competent authority, or as the result of a renegotiation of a contract or subcontract with the United States, the taxpayer shall report such change or correction in federal taxable income or federal items of tax preference within 90 days after the final determination of such change, correction, or renegotiation, or as otherwise required by regulation, and shall concede the accuracy of such determination or state wherein it is erroneous. Any taxpayer filing an amended federal income tax return shall also file within 90 days thereafter an amended return under this act, and shall give such information as the Division of Taxation may require. There may be provided by regulation such exceptions to the requirements of this section as may be necessary to carry out the purposes of this section.

L.1961, c. 32, p. 144, § 36. Amended by L.1961, c. 129, p. 776, § 22; L.1970, c. 304, § 6; L.1972, c. 12, § 5; L.1981, c. 374, § 3, eff. Dec. 30, 1981.

54:8A-37. *Additional deductions*

(a) In addition to the deductions authorized in section 35(b), any taxpayer shall be allowed the deductions itemized in this section to the same extent that such deductions are allowed to New Jersey residents who are subject to the income tax laws of a critical area state other than New Jersey. To the extent that any deduction itemized in this section has been taken by a taxpayer to compute his Federal adjusted gross income, such deductions shall not be allowed to a taxpayer computing his gross income in accordance with the provisions of section 36 of this act.

(b) Subject to the limitations expressed in subsection (a) hereof and any other limitations set forth in this act, the following deductions shall be allowed:

(1) Deduction of interest or accrued within the taxable year on indebtedness except interest on indebtedness incurred or continued to purchase or carry obligations or securities the income from which is exempt from tax under this act.

(2) Deduction of taxes paid or accrued within the taxable year except—

(A) Income taxes imposed by this State or any other taxing jurisdiction,

(B) Federal import duties, excise and stamp taxes,

(C) Estate, inheritance, legacy, succession and gift taxes,

(D) Taxes assessed against local benefits of a kind tending to increase the value of the property assessed, and

(E) License fees payable for operation or ownership of motor vehicles; State and local license fees; taxes on cigarettes, other tobacco products and alcoholic beverages.

(3) Deductions of losses sustained during the taxable year, not compensated by insurance or otherwise, except—

(A) Losses, not incurred in a trade or business or in any transaction entered into for profit, shall be allowed only if they arise from fire, storm, shipwreck or other casualty or from

theft, and only to the extent that the amount of loss to an individual arising from each casualty, or from each theft, exceeds $100.00;

(B) Losses from gambling activities shall be allowed only to the extent of the gains from such activities;

(4) Deduction of any charitable contribution payment of which is made within the taxable year to the extent that the aggregate of such contributions does not exceed 20% of the taxpayer's gross income.

In addition, there shall be allowed a deduction of any charitable contribution not in excess of 10% of the taxpayer's gross income which is made by the taxpayer within the taxable year to a religious organization, an educational organization which normally maintains a regular faculty and has a regularly enrolled body of students in attendance, an organization, the principal purposes or functions of which are the providing of medical or hospital care or medical education or medical or agricultural research, a governmental unit or organization referred to in subparagraph (B) below which normally receives a substantial part of its support from a governmental unit described in subparagraph (A) below or from direct or indirect contributions from the general public.

In the case of an individual, if the amount of charitable contributions described above, payment of which is made within a taxable year beginning after December 31, 1963, exceeds 30% of the taxpayer's adjusted gross income for such year (computed without regard to any net operating loss carryback to such year), such excess shall be treated as a charitable contribution paid in each of the 5 succeeding taxable years in order of time.

For the purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of

(A) A state, territory, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

(B) A corporation, trust, community chest, fund or foundation—

(i) Created or organized in the United States or in any possession thereof, or under the law of the United States, any state or territory, the District of Columbia, or any possession of the United States;

(ii) Organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(iii) No part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(iv) No substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

(C) A post or organization of war veterans, or an auxiliary unit or society of, or trust or foundation for, any such post or organization—

(i) Organized in the United States or any of its possessions, and

(ii) No part of the net earnings of which inures to the benefit of any private shareholder or individual.

(D) A domestic fraternal society, order, or association, operating under the lodge system, but only if such contribution or gift is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

(E) A cemetery company owned and operated exclusively for the benefit of its members or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual.

(5) (A) Deduction of expenses paid during the taxable year, not compensated for by insurance or otherwise, for

medical care of the taxpayer, his spouse or a dependent as follows:

(i) If neither the taxpayer nor his spouse has attained the age of 65 before the close of the taxable year—

(a) The amount of such expenses for the care of any dependent who—

(1) Is the mother or father of the taxpayer or of his spouse, and

(2) Has attained the age of 65 before the close of the taxable year, and

(b) The amount by which such expenses for the care of the taxpayer, his spouse, and such dependents (other than any dependent described in paragraph (a) of this subsection) exceed 3% of gross income.

(ii) If either the taxpayer or his spouse has attained the age of 65 before the close of the taxable year—

(a) The amount of such expenses for the care of the taxpayer and his spouse,

(b) The amount of such expenses for the care of any dependent described in paragraph (i) (a), and

(c) The amount by which such expenses for the care of such dependents (other than any dependent described in paragraph (i)(a)) exceeds 3% of the gross income.

(B) Amounts paid during the taxable year for medicine and drugs which (but for this paragraph) would be taken into account in computing the deduction under subsection (A) shall be taken into account only to the extent that the aggregate of such amounts exceeds 1% of gross income, except that the gross income limitation herein shall not apply to amounts paid for the care of the taxpayer and his spouse, if either of them has attained the age of 65 before the close of the taxable year, or for the care of the mother or father of the taxpayer or of his spouse, and has attained the age of 65 before the close of the taxable year.

(C) Except as provided in subsection (E), the deduction under this section shall not exceed $5,000.00, multiplied by the

number of $600.00 exemptions allowed for the taxable year as a deduction under section 10 of this act (other than exemptions relating to additional exemptions for age or blindness); except that the maximum deduction under this section shall be—

(i) $10,000.00, if the taxpayer is single and not the head of a household and not a surviving spouse or is married but files a separate return; or

(ii) $20,000.00, if the taxpayer files a joint return with his spouse or is the head of a household or a surviving spouse.

(D) For purposes of subsection (A), expenses for the medical care of the taxpayer which are paid out of his estate during the 1-year period beginning with the day after the date of his death shall be treated as paid by the taxpayer at the time incurred.

(E) (i) Subject to the provisions of paragraph (ii) hereunder the deductions under this subsection shall not exceed—

(a) $20,000.00, if the taxpayer has attained the age of 65 before the close of the taxable year and is disabled, or if his spouse has attained the age of 65 before the close of the taxable year and is disabled and if his spouse does not make a separate return for the taxable year, or

(b) $40,000.00, if both the taxpayer and his spouse have attained the age of 65 before the close of the taxable year and are disabled and if the taxpayer files a joint return with his spouse.

(ii) For purposes of paragraph (i) hereunder

(a) Amounts paid by the taxpayer during the taxable year for medical care, other than amounts paid for—

(1) His medical care, if he has attained the age of 65 before the close of the taxable year and is disabled, or

(2) The medical care of his spouse, if his spouse has attained the age of 65 before the close of the taxable year and is disabled, shall be taken into account only to the extent that such amounts do not exceed the maximum limitation provided in subsection (C) herein which would (but for the

provisions of this subsection) apply to the taxpayer for the taxable year;

(b) If the taxpayer has attained the age of 65 before the close of the taxable year and is disabled, amounts paid by him during the taxable year for his medical care shall be taken into account only to the extent that such amounts do not exceed $20,000.00; and

(c) If the spouse of the taxpayer has attained the age of 65 before the close of the taxable year and is disabled, amounts paid by the taxpayer during the taxable year for the medical care of his spouse shall be taken into account only to the extent that such amounts do not exceed $20,000.00.

(iii) For purposes of paragraph (i) hereunder, an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Division of Taxation may require.

(iv) For purposes of paragraph (i) hereunder, the determination as to whether the taxpayer or his spouse is disabled shall be made as of the close of the taxable year of the taxpayer, except that if his spouse dies during such taxable year such determination shall be made with respect to his spouse as of the time of such death.

(6) Deduction shall be allowed for expenses paid during the taxable year by a taxpayer who is a woman or a widower or is a husband whose wife is incapacitated or is institutionalized, for the care of the taxpayer's child or stepchild under the age of 13 years or is physically or mentally incapable of caring for himself, but only if such care is for the purpose of enabling the taxpayer to be gainfully employed but such deduction shall not exceed $600.00 for any taxable year. The $600.00 limit herein shall be increased (to an amount not above $900.00) by the

amount of expenses incurred by the taxpayer for any period during which the taxpayer had two or more dependents.

In the case of a married woman, and in the case of a husband whose wife is incapacitated, this deduction shall be allowed only if a joint return is filed, and shall be reduced by the amount (if any) by which the adjusted gross income of the taxpayer and his spouse exceeds $6,000.00.

(7) Deduction for amounts paid by a husband to his wife for alimony, support or separate maintenance pursuant to a court decree or for support or maintenance pursuant to a written separation agreement.

(8) Deductions shall be allowed for moving expenses paid or incurred during the taxable year in connection with the commencement of work by the taxpayer as an employee at a new principal place of work.

(A) No deduction shall be allowed unless

(i) The taxpayer's new principal place of work

(a) Is at least 20 miles farther from his former residence than was his former principal place of work or

(b) If he had no former principal place of work, is at least 20 miles from his former residence, and

(ii) During the 12-month period immediately following his arrival at the general location of his new principal place of work, the taxpayer is a full-time employee, in such general location, during at least 39 weeks.

(B) Moving expenses means only the reasonable expenses

(i) Of moving household goods and personal effects from the former residence to the new residence and

(ii) Of traveling (including meals and lodging) from the former residence to the new place of residence.

In the case of any individual other than the taxpayer, expenses referred to herein shall be taken into account only if such individual has both the former residence and the new residence as his principal place of abode and is a member of the taxpayer's household.

(C) No deductions shall be allowed under this section for any item to the extent that the taxpayer received reimbursement or other expense allowance for such item which is not included in his gross income.

(9) In addition to any deduction taken under section 35(a) of this act or in the computation of Federal adjusted gross income in the case of a taxpayer who has computed his gross income in accordance with the provisions of section 36 of this act, there shall be allowed a deduction for all the ordinary and necessary expenses paid or incurred by a taxpayer, including traveling expenses while away from home, as an employer or an employee during the taxable year in carrying on or working at any trade or business.

(10) Deduction for net premiums paid or incurred by a taxpayer during the taxable year with respect to any life insurance or endowment policy upon his life, but such deduction shall not exceed $150.00 in the aggregate; provided, however, for taxable years beginning on or after January 1, 1971 such amount shall not exceed $100.00 in the aggregate; and for taxable years beginning on or after January 1, 1972, such amount shall not exceed $50.00 in the aggregate; and for taxable years beginning on or after January 1, 1973, no such deduction shall be allowed.

(c) Any taxpayer who elects to take the itemized deducions allowed in this section be permitted to take the full amount of the deduction permitted in section 35(b) and in this section except that if (a) his gross income, as defined in section 7, is exceeded by (b) his entire gross income by more than $100.00, his itemized deductions allowed in section 35(b) and this section shall be limited by the percentage which (a) is of (b). The manner for determining a taxpayer's entire gross income shall be provided by regulation. Such regulations may authorize the use of Federal adjusted gross income for this purpose.

L.1961, c. 32, p. 144, § 37. Amended by L.1961, c. 129, p. 779, § 23; L.1964, c. 279, § 3; L.1970, c. 304, § 7.

54:8A-37.1. *Repealed by L.1979, C. 437, § 2, eff. Feb. 14, 1980*

54:8A-38. *Inventories*

Whenever the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the regulations hereunder may prescribe, conforming as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income. L.1961, c. 32, p. 144, § 38.

54:8A-39. *Net capital gain or loss; computation; deductions*

(a) The net capital gain or loss of a taxpayer shall be computed by totaling the gains from sales or other dispositions during the taxable year of capital assets having an actual situs within the source state and subtracting therefrom the losses from sales or other dispositions of capital assets having an actual situs in the source state.

(b) (1) In any taxable year in which a taxpayer has a net capital loss such loss shall be allowed as a deduction from gross income only to the extent of $1,000.00 or the taxpayer's net income whichever is lower.

(2) Subject to the limitation of paragraph (1) hereof, if for any taxable year the taxpayer has a net capital loss, the amount thereof shall be treated as a capital loss and deductible from gross income in each of the succeeding taxable years to the extent that such amount exceeds the total of any net capital gains of any taxable years intervening between the taxable year in which the net capital loss arose and such succeeding taxable year. For purposes of this section, a net capital gain shall be computed without regard to such net capital loss or to any net capital losses arising in any such intervening taxable years.

(c) In any taxable year in which net capital gain exceeds the net capital loss, 40% of the amount of such excess shall be a deduction from gross income; provided, however, that in any taxable year commencing on and after January 1, 1982 in

which net capital gain exceeds the net capital loss, 60% of the amount of such excess shall be a deduction from gross income.

L.1961, c. 32, p. 145, § 39. Amended by L.1961, c. 129, p. 787, § 24; L.1962, c.70, § 7; L.1964, c. 279, § 4; L.1972, c. 12, § 6; L.1979, c. 437, § 3, eff. Feb. 14, 1980; L.1981, c. 374, § 4, eff. Dec. 30, 1981.

54:8A-40. *Items not deductible*

In computing net income and net capital gain no deduction shall in any case by allowed in respect of:

a. Personal, living, or family expenses.

b. Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate.

c. Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made.

d. Any amount otherwise allowable as a deduction which is allocable to income not required to be included in gross income for the purposes of this act, unless allowed by regulation, which shall also provide for the apportionment or allocation of such deductions as between income which would be required to be included in gross income under this act and income which would not be required to be so included.

L.1961, c. 32, p. 145, § 40, as amended L.1961, c. 129, p. 788, § 25.

54:8A-41. *"Capital assets" defined*

The words "capital assets" mean property held by the taxpayer (whether or not connected with his trade or business), but do not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or

land used in the trade or business, or property used in the trade or business of a character which is subject to an allowance for depreciation.

L.1961, c. 32, p. 146, § 41.

54:8A-42. *Basis of property; gain or loss from sale or other disposition of property*

(a) The basis of property, except as otherwise provided in this act, shall be the cost of such property.

(1) If the property should have been included in the last inventory, the basis shall be the last inventory value thereof.

(2) The basis of property in the hands of a person acquiring the property from a decedent other than by purchase or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death.

(3) If the property was acquired by gift the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if such basis is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value.

(4) If the basis of property cannot otherwise be established, the basis of such property shall be the fair market value at the time of acquisition.

(b) The gain from the sale or other disposition of property shall be the excess of the amount realized over the basis of such property and the loss shall be the excess of the basis of such property over the amount realized. L.1961, c. 32, p. 146, § 42, as amended L.1961, c. 129, p. 788, § 26.

54:8A-43. *Agreements with taxpayer relating to liability*

The Division of Taxation is authorized to enter into a written agreement with any taxpayer relating to the liability of such taxpayer in respect of any tax, fee, penalty or interest hereto-

fore or hereafter imposed by this act, if it is found that such agreement is in the best interests of the State, which agreement shall be final and conclusive, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact:

(a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of this State, and

(b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded.

L.1961, c. 32, p. 146, § 43, as amended L.1961, c. 129, p. 789, § 27.

54:8A-44. *Persons required to file*

(a) On or before the filing date prescribed in section 18 (C. 54:8A-18) of this act, an income tax return shall be made and filed by or for every individual having a gross income derived from sources within his source state in excess of the sum of his personal exemptions allowed in section 10 (C. 54:8A-10) of this act, or having any items of tax preference derived from or connected with New Jersey sources in excess of the specific deduction provided in section 6.2(c) (C. 54:8A-6.2(c)).

(b) (1) If the Federal income tax liability of husband or wife is determined on a separate Federal return, their New Jersey income tax liabilities and returns shall be separate.

(2) If the Federal income tax liabilities of husband and wife (other than a husband and wife described in paragraph (3)) are determined on a joint Federal return, or if neither files a Federal return:

(A) They shall file a joint New Jersey income tax return, and their tax liabilities shall be joint and several, or

(B) They may elect to file separate New Jersey income tax returns on a single form if they comply with the requirements of the Division of Taxation in setting forth information, and in such event their tax liabilities shall be separate.

(3) If either husband or wife is a resident and the other is a nonresident, they shall file separate New Jersey income tax returns on such single or separate forms as may be required by the Division of Taxation, and in such event their tax liabilities shall be separate.

(4) Marital or other status. An individual's marital or other status under subsection 2(c) (C. 54:8A-2(c)), subsection 9(b) of P.L. 1961, c. 32 (C. 54:8A-9(b)) and subsection 7(a)(3)(B) of this amendatory and supplementary act shall be presumed to be the same as his marital or other status for purposes of establishing the applicable Federal income tax rates. However, an individual who is a nonresident alien for Federal income tax purposes and who fails to qualify under subsection 2(c), or subsection 9(b) of P.L. 1961, c. 32 or subsection 7(a)(3)(B) of this amendatory and supplementary act solely by reason of his status for purposes of establishing the applicable Federal income tax rates shall, nevertheless, qualify under such provisions provided he files a statement with his return setting forth such information in respect to his status as the director shall prescribe.

(c) The return of any deceased individual shall be made and filed by his fiduciary or other person charged with his property.

(d) The return for an individual who is unable to make a return by reason of minority or other disability shall be made and filed by his fiduciary or other person charged with the care of his person or property (other than a receiver in possession of only a part of his property), or by his duly authorized agent.

(e) Any tax under this act, and any increase, interest or penalty thereon, shall, from the time it is due and payable, be a personal debt of the person liable to pay the same, to the State of New Jersey.

(f) If the amount of net income or Federal items of tax preference for any year of any taxpayer as returned to the United States Treasury Department or to an appropriate State officer is changed or corrected by the taxpayer or the Commissioner of Internal Revenue or other officer of the United States

or other competent authority, or where a renegotiation of a contract or subcontract with the United States results in a change in net income, or Federal items of tax preference such taxpayer shall report such change or corrected net income, or Federal items of tax preference or the results of such renegotiation within 90 days after the final determination of such change or correction or renegotiation, or as required by regulation, and shall concede the accuracy of such determination or state wherein it is erroneous. Any taxpayer filing an amended return with such department or officer shall also file within 90 days thereafter an amended return in this State which shall contain such information as the regulations shall require.

L.1961, c. 32, p. 147, § 44. Amended by L.1961, c. 129, p. 789, § 28; L.1962, c. 70, § 8; L.1970, c. 304, § 8; L.1972, c. 12, § 7; L.1978, c. 131, § 5, eff. Oct. 18, 1978.

54:8A-45. *Repealed. L.1962, c. 70, § 12*

54:8A-46. *Action for collection of tax*

(a) At the request of the Division of Taxation, the Attorney General may bring suit, in the name of this State, in the appropriate court of any other State to collect any tax legally due this State under this act.

(b) The courts of this State shall recognize and enforce liabilities for taxes lawfully imposed by any other State, upon incomes, which extends a like comity to this State, and the duly authorized officer of any such State may sue for the collection of such a tax in the courts of this State. A certificate of the Secretary of State of such other State that an officer suing for the collection of such a tax is duly authorized to collect the same shall be conclusive proof of such authority.

(c) For the purposes of this section, the words "tax" and "taxes" shall include interest and penalties due under this act, and liability for such interest or penalties or both, due under a taxing statute of another State shall be recognized and enforced by the courts of this State to the same extent that the laws of such other State permit the enforcement in its courts of

liability for such interest or penalties or both, due under this act. L.1961, c. 32, p. 149, § 46, as amended L.1961, c. 129, p. 792, § 30; L.1962, c. 70, § 9.

54:8A-47. *Payment of tax; signing of documents, certification of statements*

(a) A person required to make and file a return under this act shall without assessment, notice or demand, pay any tax due thereon to the Division of Taxation on or before the date fixed for filing such return (determined without regard to any extension of time for filing the return). The Division of Taxation shall prescribe by regulation the place for filing any return, declaration, statement, or other document required pursuant to this act for payment of any tax.

(b) Any return, declaration, statement or other document required to be made pursuant to this act shall be signed in accordance with regulations or instructions prescribed by the Division of Taxation. The fact that an individual's name is signed to a return, declaration, statement, or other document, shall be prima facie evidence for all purposes that the return, declaration, statement or other document was actually signed by him.

(c) The making or filing of any return, declaration, statement or other document or copy thereof required to be made or filed pursuant to this act, including a copy of a Federal return, shall constitute a certification by the person making or filing such return, declaration, statement or other document or copy thereof that the statements contained therein are true and that any copy filed is a true copy. L.1961, c. 32, p. 150, § 47, as amended L.1961, c. 129, p. 792, § 31.

54:8A-48. *Taxable year; methods of accounting*

(a) A taxpayer's taxable year under this act shall be the same as his taxable year for Federal income tax purposes.

(b) If a taxpayer's taxable year is changed for Federal income tax purposes, his taxable year for purposes of this act

shall be similarly changed. If a taxable year of less than 12 months results from a change of taxable year, the standard deduction, and the exemptions shall be prorated under regulations of the Division of Taxation.

(c) A taxpayer's method of accounting under this act shall be the same as his method of accounting for Federal income tax purposes. Net income shall be computed under such method as shall be prescribed by the Division of Taxation to reflect income.

(d) (1) If a taxpayer's method of accounting is changed for Federal income tax purposes, his method of accounting for purposes of this act shall be similarly changed.

(2) If a taxpayer's method of accounting is changed, other than from an accrual to an installment method, any additional tax which results from adjustments determined to be necessary solely by reason of the change shall not be greater than if such adjustments were ratably allocated and included for the taxable year of the change and the preceding taxable years, not in excess of 2, during which the taxpayer used the method of accounting from which the change is made.

(3) If a taxpayer's method of accounting is changed from an accrual to an installment method, any additional tax for the year of such change of method and for any subsequent year which is attributable to the receipt of installment payments properly accrued in a prior year, shall be reduced by the portion of tax for any prior taxable year attributable to the accrual of such installment payments, in accordance with regulations of the Division of Taxation.

L.1961, c. 32, p. 151, § 48. Amended by L.1961, c. 129, p. 793, § 32; L.1972, c. 12, § 8.

54:8A-49. *Withholding return*

(a) Every employer required to deduct and withhold tax under this act shall, for each calendar quarter, on or before the last day of the month following the close of such calendar quarter, file a withholding return as prescribed by the Division

of Taxation and pay over to the Division of Taxation the taxes so required to be deducted and withheld; but the Division of Taxation may, by regulation, provide that every such employer shall on or before the fifteenth day of each month pay over to the Division of Taxation, or a depositary designated by the Division of Taxation, the taxes so required to be deducted and withheld if such taxes aggregate $100.00 or more for the preceding calendar month. Where the aggregate amount so deducted and withheld by any employer is less than $25.00 in a calendar quarter and the aggregate for the calendar year can reasonably be expected to be less than $100.00, the Division of Taxation may by regulation permit an employer to file an annual return. The Division of Taxation may, if it believes such action necessary for the protection of the revenues, require any employer to make such return and pay to it the tax deducted and withheld at any time, or from time to time.

(b) Whenever any employer fails to collect, truthfully account for, pay over the tax, or make returns of the tax as required in this section, the Division of Taxation may serve a notice requiring such employer to collect the taxes which become collectible after service of such notice, to deposit such taxes in a bank approved by the Division of Taxation in a separate account, in trust for and payable to the Division of Taxation and to keep the amount of such tax in such account until payment over to the Division of Taxation. Such notice shall remain in effect until a notice of cancellation is served by the Division of Taxation. L.1961, c. 32, p. 151, § 49, as amended L.1961, c. 129, p. 794, § 33.

54:8A-50. *Liability of employer required to withhold tax; special fund; right of action against employer*

Every employer required to deduct and withhold tax under this act is hereby made liable for such tax. For such purposes any amount required to be withheld and paid over to the Division of Taxation shall be considered the tax of the employer. Any amount of tax actually deducted and withheld under this act shall be held to be a special fund in trust for the

Division of Taxation. No employee shall have any right of action against his employer in respect to any moneys deducted and withheld from his wages and paid over to the Division of Taxation in compliance or in intended compliance with this act. L.1961, c. 32, p. 152, § 50, as amended L.1961, c. 129, p. 795, § 34.

54:8A-51. *Failure of employer to deduct and withhold tax or to pay tax withheld*

(a) If an employer fails to deduct and withhold tax as required, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer, but the employer shall not be relieved from liability for any penalties, interest, or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

(b) If any employer shall fail to make a return and pay a tax withheld by him at the time required by or under the provisions of this act, such employer shall be liable for such tax and shall pay the same together with all penalties and interest charges thereon as provided in the case of any taxpayer under section 53 of this act, and such additional amount of penalties and interest shall in no case be charged to or collected from the taxpayer by said employer. The Division of Taxation shall have the same rights and powers for the collection of such tax, penalties and interest against such employer as are now prescribed by this act for the collection of a tax against a taxpayer. L.1961, c. 32, p. 152, § 51, as amended L.1961, c. 129, p. 795, § 35; L.1962, c. 70, § 10.

54:8A-52. *Reciprocity credit; relief from withholding*

If it shall appear to the satisfaction of the division, based upon an opinion of the Attorney General of this State, that any person whose wages, salaries or commissions are subject to deduction and withholding are liable for tax upon the same income under the law of the State of which he is a resident, under circumstances such as will entitle him to a reciprocity

credit under this act sufficient to offset all taxes imposed hereunder, and that such State makes payment to the division of amounts deducted and withheld on account of earnings and gains derived by residents of this State from sources within such State and subject to tax under this act, the division may, by regulation, relieve residents of such State from being required to make any return under this act, and, upon the filing of such proofs as the regulations may require, relieve the employer of such taxpayers from the requirement to deduct and withhold any amount otherwise required by this act, for such period as the conditions herein stated continue to be satisfied; but the division may, notwithstanding the existence of such conditions, continue to require the making of such returns and the deduction and withholding of such amounts whenever it determines such action is appropriate or reasonably required to insure compliance with this act or whenever an appropriate official of such other State certifies that such State desires that such deduction and withholding be continued.

The division may consider amounts withheld under the provisions of this act as withheld for the benefit of the State of which such persons are resident but such amounts shall not be paid over to such State unless such State has complied with the provisions of this act and is thereby entitled to such amounts. Any amounts withheld, however, may be expended for any of the purposes specified in section 20 of this act. L.1961, c. 32, p. 152, § 52, as amended L.1961, c. 129, p. 796, § 36.

54:8A-53. *Delinquent return or taxes; penalties; interest; abatement or remission*

Any taxpayer who shall fail to file his return when due or to pay any tax when the same becomes due, as herein provided, shall be subject to such penalties and interest as provided in the State Tax Uniform Procedure Law, subtitle 9 of the Title 54 of the Revised Statutes. If the Division of Taxation determines that the failure to comply with any provision of this act was excusable under the circumstances, it may abate or remit such part or all of the penalty as shall be appropriate under such circumstances.

With respect to taxes paid not later than October 1, 1962, the Division of Taxation may also abate or remit such part or all of the interest as shall be appropriate under such circumstances.

L.1961, c. 32, p. 153, § 53. Amended by L.1961, c. 129, p. 797, § 37; L.1962, c. 70, § 11; L.1975, c. 177, § 7, eff. Aug. 4, 1975.

54:8A-54. *Applicability of state tax uniform procedure law*

The taxes imposed by this act shall be governed in all respects by the provisions of the State tax uniform procedure law (subtitle 9 of Title 54 of the Revised Statutes) except only to the extent that a specific provision of this act may be in conflict therewith. L.1961, c. 32, p. 153, § 54.

54:8A-55. *Administration; determination of amount of tax due*

(a) The Division of Taxation in the Department of the Treasury shall administer the provisions of this act, adopt regulations necessary or desirable to effectuate its purposes or to make explicit the treatment of various items, authorize appropriate systems of accounting and computation, provide for the allocation of income, itemized deductions, gains and losses in cases where the source of connection thereof may be partly within and partly without the source State of the taxpayer, and prepare instructions for the guidance and information of taxpayers. Wherever possible, consistent with reasonable application of the provisions of this act, the division shall so prepare its regulations, forms, instructions and other acts to reduce the burden of making computations and returns under this act differently from similar computations and returns required of the same taxpayer with respect to the same income and gain to some other jurisdiction. The division shall also make procedural regulations for its review and correction of returns of taxpayers, the making of refunds or additional assessments of tax on such review or correction, and the assessment of the tax where no return is filed, as well as the

method and time of giving due notice thereof and providing suitable methods for appropriate protest or hearing.

In addition to objects mentioned elsewhere in this act, such regulations may describe the treatment to be accorded to items of exchange of property and the recognition or non-recognition thereof, the deferment of gains from the sale of a personal residence, war losses, employee stock options, inclusions, exclusions and exemptions from gross income, pensions, common trust funds, and may provided for the determination and assessment of interest or penalties, extensions of time for performing any act or making any payment, suspension of penalty or interest or both for limited periods, waiver or reduction of additional taxes, gathering of information and filing of reports for information, and all other matters reasonably required for the fair, impartial and practical administration of this act.

(b) Except as otherwise provided, the amount of tax due on any return shall be determined by the division within 3-1/2 years after the return was made. When the return omits an amount greater than 25% of the gross income or capital gain reported, and which should have been included, such determination shall be made within 6-1/2 years after the return was made. When no return is made, or when a return is made willfully false or fraudulent with intent to evade the tax, or if taxpayer fails to report a change or correction made by another taxing jurisdiction or fails to file an amended return when required to by this act, the amount of the tax may be determined at any time. Where, for 1 taxable year, a deduction disallowed appears to have been allowable in some other taxable year not more than 5 years prior thereto, the return for such earlier year may be revised and the tax for said year resettled, and if the same shall result in a lower tax for said earlier year, the overpayment may be allowed as a credit against, but not in excess of, any assessment resulting from the disallowance for the later year. L.1961, c. 32, p. 153, § 55.

54:8A-56. *Exercise of powers and duties of Division of Taxation by director*

All the powers, duties and responsibilities vested in the Division of Taxation by this act shall be exercised by the director thereof or his duly designated representative. L.1961, c. 32, p. 155, § 56, as amended L.1961, c. 129, p. 797, § 38.

54:8A-57. *Effective date; suspension of tax*

This act shall take effect immediately, but the tax imposed hereby, and the obligation to pay the same as well as the obligation to deduct and withhold shall be suspended and inoperative in the event that any of the moneys in the Transportation Fund shall be applied to a purpose or purposes other than one set forth in this act, from the date when such application is made until the amounts to be refunded to taxpayers as a result thereof have been allowed and paid; and the tax hereby imposed shall cease to be imposed, assessed and collected after the assessment thereof for any taxable year ending December 31, 1990, and for any part of a taxable year beginning during the year 1990 and ending December 31, 1990.

L.1961, c. 32, p. 155, § 57, approved May 29, 1962. Amended by L.1969, c. 36, § 1, eff. May 9, 1969; L.1980, c. 89, § 1, eff. Aug. 21, 1980.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,

Petitioners,

v.

SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Respondent, Sidney Glaser, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,
Richard J. Hughes Justice Complex
CN 112,
Trenton, New Jersey 08625.
(609) 292-4925

MICHAEL R. COLE,
Assistant Attorney General,
Of Counsel.

MARY R. HAMILL,
ANDREA M. SILKOWITZ
Deputy Attorneys General,
On the Brief.

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

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NO. 83-353

IN THE

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OCTOBER TERM, 1983

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,

Petitioners,

v.

SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Counterstatement of the Case

The petitioners would have this Court review through certiorari a decision of the Supreme Court of New Jersey holding simply upon the balancing of the numerous factors outlined by this Court in *Lemon* v. *Kurtzman*, 411 U.S. 192

(1973), that its declaration of invalidity of the New Jersey Emergency Transportation Tax (hereinafter ETT), N.J. S.A. 54:8A-1 *et seq.*, under the Privileges and Immunities Clause of the United States Constitution would not warrant refunds of ETT to the three named petitioners.* In seeking such further and extraordinary review of this discretionary fashioning of an equitable remedy and the concomitant determination to postpone the effective date of the ruling until January 1, 1984, to allow for the adoption of an alternative method for raising in excess of $30 million generated annually by the tax, petitioners continue to assert in dogged and unrelenting fashion the baseless contention that New Jersey's enforcement and defense of the ETT in the wake of the *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), ruling was unjustified and therefore warrants retrospective application of the declaration of invalidity. Yet, as the courts of New Jersey and this Court by its dismissal of petitioners' earlier appeal (449 U.S. 804) have recognized, the *Austin* ruling compels not a simplistic comparison of structural components of the ETT and the New Hampshire tax invalidated therein, but a painstaking analysis of the circumstances under which the allegedly discriminatory tax has been imposed and a calculation of whether the tax bears a "substantial relationship" to the evils which the tax has been enacted to correct. As demonstrated below and as articulated in the State's cross-petition for certiorari in this same action the ETT, contrary to the ruling of the New Jersey Supreme Court, should be held to survive this constitutional scrutiny. Accordingly, the State justifiably defended and relied on the validity of the tax throughout these proceedings and as a matter of

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* The total amount in issue as to these three petitioners is approximately $25,000 (Supplemental Brief for Defendant, Supreme Court of New Jersey at p. 6).

equitable discretion, the court below properly declined to give retrospective effect to its ruling. Yet, even, if as the Supreme Court of New Jersey has concluded, the tax as presently constituted is invalid under the Privileges and Immunities Clause, denial of the requests for refunds and postponement of the date of invalidity are warranted under the unique facts presented.

The critical elements of dissimiliarity between the emergency transportation tax in dispute in this litigation and the tax invalidated by the Court in *Austin* v. *New Hampshire*, can only be comprehended by a review of the complex factual record compiled before the trial court in both the initial and remand proceedings, the 1962 Agreement between New York and New Jersey respecting the taxation of interstate commuters and an appreciation of the uniqueness of the New York-New Jersey metropolitan area. Every weekday (and primarily during the peak hours of 7 to 10 a.m. and 4 to 6 p.m.) over seven million commuters traverse the Hudson River separating New Jersey from New York, 2,250,000 of these in northern New Jersey (App. B at 32a) (Pa 273) (T31-13 to 16).* The burden imposed upon transportation facilities in the northern New Jersey-New York City region by these vast numbers of commuters is exacerbated by the extraordinarily high population densities of the points of origin and destination for these commuting trips (Da**2 to Da10; Pa14-1) and the limited number of river crossings between the States. Although

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* This notation refers to the appendix to the brief filed by petitioners with the Supreme Court of New Jersey. The transcript reference is to the undated transcript of the remand proceedings in the Superior Court of New Jersey, Chancery Division.

** This notation refers to the appendix to the brief filed by respondent with the Supreme Court of New Jersey.

the number of New York commuters utilizing these transportation facilities is substantially smaller than the corresponding New Jersey interstate travelers, transportation experts have determined that these New Yorkers significantly exacerbate New Jersey's peak hour transportation problems and cause thereby the need for substantial expenditures for transportation facilities and transit subsidies (App. B at 34a to 41a; Db18 to Db20; Db46 to Db47; Db73 to Db81).

Since not all of the interstate routes and crossings nor all of the public transportation facilities are self-sustaining, New Jersey has been compelled to use general revenues to construct, maintain, and in the case of public transit, subsidize the transportation facilities in the northern part of the State. Yet because the New Jersey tax structure relies very heavily upon real property taxes, which are ordinarily paid only by residents, nonresidents who commute to New Jersey traditionally have not contributed substantially to State revenues despite deriving significant benefits from the New Jersey transportation system.

In 1961 and 1962, the New Jersey Legislature took cognizance of these tax inequities and of the pressing interstate transportation problem in the New York-northern New Jersey transportation area. The legislative means devised to generate the additional revenue needed to maintain and improve transportation facilities between New Jersey and New York was the Emergency Transportation Tax Act (N.J.S.A. 54:8A-1 *et seq.*) which is essentially a tax on individuals who use interstate transportation facilities.

Several aspects of the tax are worthy of note. Thus, the imposition of the tax was expressly made contingent upon the annual certification by the New Jersey Commissioner

of Transportation to the State Treasurer of the existence of a "critical transportation problem" in connection with transportation between this State and another state bordering thereon. N.J.S.A. 54:8A-5(c). And significantly, the Legislature mandated that all ETT revenues be paid into a special transportation fund. N.J.S.A. 54:8A-20. Other than the costs of administering the tax and of refunds to taxpayers, monies in the ETT fund are to be used exclusively to finance projects and programs designed to alleviate transportation problems between New Jersey and New York. (See N.J.S.A. 54:8A-20(a)(2)). The statute further provides that the ETT receipts may not be charged for expenditures except upon a presentation to the Attorney General itemizing the purposes for which the funds will be used, and the transmittal of such itemization to the State Treasurer "with a certification by the Attorney General endorsed thereon that the purposes for which funds are therein proposed to be used are within the terms and intent of the act . . ." N.J.S.A. 54:8A-20(b)(2). If any of the moneys in the transportation fund are not used for one of the purposes specified in the Act, a taxpayer has the right to a refund or credit equal to his pro rata share of the fund. N.J.SA. 54:8A-22.*

As explained by the Supreme Court of New Jersey in its initial opinion,** the tax as originally enacted applied only

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* An express exception to the above is provided in N.J.S.A. 54:8A-120, which directs that payments of ETT equivalent to amounts which New Yorkers would otherwise pay under New Jersey's Gross Income Tax Act (N.J.S.A. 54A:1-1 *et seq.*) be removed from the Transportation Fund, and pursuant to N.J.S.A. 54A:9-25 deposited in the Property Tax Relief Fund to which the gross income tax is dedicated. These funds are not in dispute in this action.

** A copy of this opinion is included in Appendix A to respondent's cross petition for a writ of certiorari seeking review of the Supreme Court of New Jersey's rulings as to the invalidity of the ETT under the Privileges and Immunities and Compact Clauses of the United States Constitution.

to New Jersey residents commuting to New York. The incidence of the tax was shifted to New Yorkers commuting to New Jersey when the State of New York repealed the nonresident credit in its personal income tax (theretofore available to New Jersey residents) which triggered the elimination of the reciprocal nonresident credit in the ETT. Under the subsequently enacted (and present) statutory scheme sanctioned by the 1962 Agreement entered into between the States of New York and New Jersey,* New Jerseyans' emergency transportation tax liability is offset by their payment of the New York personal income tax (N.J.S.A. 54:8A-16(b)) while New Yorkers receive a full credit against their New York personal income tax for payment of the emergency transportation tax. *New York Tax Law* §620(a) (McKinney).** The State of New Jersey from 1961 through the fiscal year ending June 30, 1980, in reliance on the Accord and the validity of the tax which generated $380,634,000 by that date (Db21) expended approximately $5.3 billion in the northern ten counties of New Jersey for its highway network and for railroad and

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* A more detailed discussion of the May 6, 1962 Accord concluded by Governors Rockefeller and Hughes appears in respondent's cross petition for writ of certiorari in this same action. The Accord appears at Appendix C to the cross petition.

** In all but a few instances (e.g. where New York real estate loses would effectively eliminate any New York tax on income earned in New Jersey) the credit reduces a New York resident's New York tax liability by the exact amount of emergency transportation tax paid. Accordingly, in the absence of an emergency transportation tax, the credit would have been eliminated, and a New Yorker's combined New Jersey and New York tax liability would have been precisely the same. The only difference, of course, is that the amount of the emergency transportation tax would have been payable to New York rather than New Jersey. Petitioners have admitted as much in this case (Da20).

bus subsidies (Db17).* Of this amount the State's expert Simpson & Curtin estimated (Db20) and the Supreme Court concluded (App. A at 14a) that approximately $182.9 million in State expenditures were allocable to New York commuters.

The present declaratory action ostensibly brought by three New York residents but actually pursued on behalf of officials of the State of New York (Da1) was not commenced until June 8, 1977, more than fifteen years after the enactment of the ETT and New York's express concurrence in the imposition of the tax (Pa1 to Pa4). Of course, then and now there was little financial incentive for individual taxpayers to bring such a challenge since no New Yorker paying the emergency transportation tax save in the rare circumstances (which do not pertain to any of petitioners herein) detailed *supra* suffered any economic harm by reason thereof.

The case proceeded, notwithstanding petitioners' suggestion to the contrary, in an expeditious fashion. Thus in response to petitioners' filing of a motion for summary judgment declaring the ETT unconstitutional under the Court's ruling in *Austin* v. *New Hampshire*, respondent alternatively moved to dismiss the complaint and for summary judgment.** At the return date of the cross mo-

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* This notation refers to the brief filed by respondents with the Supreme Court of New Jersey.

** The suggestion set forth in the petition for writ of certiorari that the aforementioned motions and an earlier motion to dismiss (on exhaustion grounds) filed in September 1977 were frivolous and filed as dilatory measures is unjustified and offensive. Each one of these motions had a substantial basis in State law (see respondent's brief filed with the Supreme Court of New Jersey in the initial proceeding at pp. 1-2, 38, 44-46 and respondent's brief filed with the Supreme Court of New Jersey after remand at p. 47) and was filed by the respondent based upon his belief that his position on the merits would be furthered if the motion was granted.

tions in December 1977 petitioners insisted upon the right to take the depositions of the persons whose affidavits had been submitted in support of the motion for summary judgment (Transcript of December 15, 1977 hearing, at T4-6 to T5-3). This resulted in the taking of more than 550 pages of depositions as well as the introduction of hundreds of pages of exhibits in connection with those depositions (Ppa50 to Ppa100, Ppa120 to Ppa131).* The matter was then brought back before the trial court, first in February and then in March 1978, at which time there was further controversy concerning the parameters of the record (Ppa145 to Ppa149, Dda45 to Dda59).*

On October 24, 1978 the trial court issued a comprehensive opinion upholding the constitutionality of the ETT, wholly rejecting petitioners' contention that *Austin* v. *New Hampshire* compelled a contrary result. Thus, the trial court noted:

> Nothing in *Austin* indicates any reason for the enactment of the New Hampshire statute other than to raise general revenue. The statute before this Court dedicates the use of the revenues collected under the Act to the Transportation Fund. There is no indication of dedication in *Austin*. The purpose of the New Jersey Act is the alleviation of the commuter problem. Thus, a direct benefit is intended to New York commuters such as Salorio [Cr. Pet. App. B at 53a].**

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* These notations refer to the appendix to the briefs filed by petitioners and respondents in the initial proceedings before the Supreme Court of New Jersey which was stipulated as part of the record in the remand proceedings (App. B at 25).

** This notation refers to the Appendix to the State's cross petition for a writ of certiorari in this same action.

The trial court further found that, assuming the tax "is administered in accordance with the express purposes" declared therein, New York commuters "will receive a direct benefit from the expenditure of the funds" (Cr. Pet. App. B at 51a). It further concluded that

> . . . the transportation problem is substantial and the ultimate impact of the tax upon residents and non-residents bears a close relation to the challenge of correcting the traffic and commuting problems [Cr. Pet. App. B at 54a].

Based upon these factual findings, the trial judge concluded that the petitioners had failed to demonstrate that the ETT violates the United States Constitution [Cr. Pet. App. B at 56a].

The trial court also determined that the ETT and its companion legislation in New York had been enacted and remained in effect pursuant to a reciprocal agreement entered into between the States, consistent with the principles of interstate comity embodied in the Privileges and Immunities Clause of Article IV (Cr. Pet. App. B at 55a). Finally, the trial court upheld the tax under the Equal Protection Clause of the Fourteenth Amendment, reasoning that the State was not required to demonstrate a compelling state interest and that the tax bore a "reasonable relation to a proper governmental purpose" (Cr. Pet. App. B at 54a).

Upon direct certification to review the judgment of the trial court,* the Supreme Court of New Jersey affirmed the trial court's equal protection ruling (Cr. Pet. App. A

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* Pursuant to N.J. Ct. R. 2:12-2 the Supreme Court of New Jersey may directly certify an appeal pending unheard in the Superior Court of New Jersey, Appellate Division.

at 35a). The court further concurred with the State's arguments and the trial court ruling that as a matter of law the costs concurred in alleviating transportation problems created by New Yorkers commuting to New Jersey would serve as a "valid independent justification" for the ETT (Cr. Pet. App. A at 21a). However, it concluded that the trial court had erred in its determination that the 1962 agreement between New York and New Jersey was an enforceable reciprocal agreement sufficient to support the constitutionality of the ETT under the Compact and Privileges and Immunities Clauses of the United States Constitution (Cr. Pet. App. A at 30a). The court further held that the trial court had acted improvidently in deciding the Privileges and Immunities issue on cross-motions for summary judgment (i.e. identifying the extent to which the New Jersey commuter constituted "a peculiar source" of the New Jersey transportation crisis and concluding that the tax levied on the New York commuter bore a "substantial relationship" to costs expended by New Jersey in alleviating the crisis) (Cr. Pet. App. A at 36a). Finding the record inadequate to decide these factual questions, the court ordered a remand

> . . . to permit a full exploration of the benefits and burdens to non-residential commuters occasioned by State transportation programs and imposition of the ETT [Cr. Pet. App. A at 26a].

In providing guidelines for further trial proceedings, the Supreme Court of New Jersey directed:

> On remand, evidence should be introduced to enable the trial court to compare the transportation benefits New York residents receive and the tax contributions they are required to make. The data must, therefore, include statistics on annual state and local expenditures—identified by source—for commuter

> rail and bus service and for construction and maintenance of highways used by interstate commuters. Figures on the amount and application of ETT monies must also be introduced for the years during which non-residents paid emergency transportation taxes [Cr. Pet. App. A at 26a to 27a].

Although the opinion of the Supreme Court of New Jersey was squarely based on the principles set forth in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978) and *Toomer* v. *Witsell*, 334 U.S. 385 (1948), petitioners chose to press their claim that the *Austin* v. *New Hampshire* ruling compelled a summary invalidation of the ETT and filed a Notice of Appeal with this Court on June 19, 1980 from those portions of the Supreme Court of New Jersey's opinion affirming the constitutionality of the emergency transportation tax and remanding the case for further proceedings. On July 24, 1980, the State filed a motion to dismiss on the grounds of lack of finality of the Supreme Court of New Jersey's remand opinion and on the same date filed a cross-petition for a writ of certiorari as to that portion of the Supreme Court of New Jersey's decision declaring the 1962 Agreement between New York and New Jersey unenforceable and thus an insufficient basis for upholding the ETT against the Privileges and Immunities challenge. On October 6, 1980 this Court dismissed petitioners' appeal and denied the State's cross-petition.

In the remand hearing conducted in May 1981 respondent with the assistance of experts in the transportation field adduced extensive evidence on the exact nature of the transportation problem, the extent to which New York commuters contribute to it, the benefits they derive from New Jersey's expenditures for transportation facilities, and net ETT collections over the twenty-year history of the tax

(App. B at 34a to 53a). Petitioners countered with expert opinion purporting to refute the State's evidence (App. B at 28a, 40a, 43a to 49a). Upon the conclusion of the five day hearing the trial court in an opinion issued on October 9, 1981, upheld the constitutionality of the ETT under the Privileges and Immunities Clause (App. B at 53a to 54a). In so doing, the trial court accepted as persuasive virtually all the State's evidence and based its findings almost exclusively on the reports and testimony of the State's experts. Thus the court agreed with the State's expert Simpson & Curtin that commuter demand is the primary cause of New Jersey's transportation problem, both as to highway and transit facilities (App. B at 30a to 33a). The court further accepted the commutation figures presented in the Simpson & Curtin report pointing out, as required by the Supreme Court, the relative numbers of New York to New Jersey and New Jersey to New York commuters during the period under review. With the exception of the allocation of highway maintenance expenditures to the commuting population, (see App. B at 51a to 52a), the trial court also adopted the allocation of costs to New York highway, bus and rail commuters developed by Simpson & Curtin and in so doing rejected petitioners' proposed incremental analysis of allowable transportation expenditures (App. B at 47a). On this basis, the trial court concluded that $182.9 million of State transportation expenditures were properly allocable to the New York commuters who had paid a total of $380 million over the twenty-year history of the ETT (App. B at 36a).

While these allocable costs alone would not justify more than approximately 50% of the total amount of tax imposed upon New York commuters, the trial court did find that the benefits calculated by the State's experts to have been derived by New York commuters from these expendi-

tures* were commensurate with the ETT imposed upon them (App. B at 53a to 54a). The trial court thus concluded that the State had established that the ETT was not violative of the Privileges and Immunities Clause because New York commuters are a peculiar source of the critical transportation problem in the New York-New Jersey metropolitan area (App. B at 54a) and the burden of the ETT on New York commuters is substantially commensurate with the benefits they derive from New Jersey's transportation facilities (App. B at 53a to 54a).

Judgment in favor of the State was entered on October 26, 1981 (Pa47 to Pa48, Pa46) and on November 6, 1981, petitioners filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division (Pa49 to Pa51). Petitioners, following the filing of all parties' briefs, moved for direct certification of the appeal pending unheard in the Appellate Division which motion was granted by the Supreme Court of New Jersey on April 27, 1982. 91 N. J. 182, —— A.2d —— (1982). In a decision issued on June 8, 1983, the Supreme Court of New Jersey, reversing the trial court, concluded that the ETT (as presently constituted) could not survive petitioners' challenge under the Privileges and Immunities Clause in that the State had failed to establish that the costs incurred by New Jersey as a result of New York commuters' exacerbation of New Jersey's peak hour transportation problems ($182,973,042) bore a "substantial relationship" to the tax imposed on these commuters ($381 million) (App. A at 13a

* These benefits consist of savings in time and user costs attributable primarily to new highway construction and widening, highway resurfacing, operational improvements, safety improvements, maintenance and drainage, and, in the transit area, savings in time and costs (Db20 to Db29; App. B at 44a to 54a).

to 14a).* Nevertheless, in view of the State's "justifiable reliance" upon the ETT as a source of revenue, and the reciprocal tax crediting arrangement made with New York in 1962, the absence of any application by petitioners or other taxpayers for interim injunctive relief during the pendency of the action as well as the fiscal chaos which would result should it be required to refund the ETT as compared to the absence of any financial harm suffered by petitioners by reason of the collection of the ETT, the court concluded, as a matter of its discretion, that no refunds would be ordered (App. A at 16a to 20a). For these reasons, and because the State had established the validity of approximately 50% of the annual taxes collected from New York commuters, the court postponed the effective date of its decision for six months hence (until January 1, 1984) to provide an opportunity for the New Jersey Legislature and executive branch to devise an alternative source of revenue to meet the costs incurred in alleviating the transportation burdens imposed by New York commuters (App. A at 20a to 22a).

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* In so ruling the Court rejected the trial court's acceptance of the State's experts' calculation of benefits derived from these costs, finding that a misunderstanding had resulted from the repeated references in the Supreme Court of New Jersey's initial opinion to such benefits (App. A. at 11a). Rather than directing an admeasurement of "benefits" on remand, the Court stated it had intended that a record be created on the "costs of those benefits" (*Ibid.* n.9).

ARGUMENT

In denying retrospective effect to its ruling invalidating the Emergency Transportation Tax, the Supreme Court of New Jersey properly exercised its discretion as empowered by the Court's ruling in *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973).

By this petition the named New York commuters seek to overturn the decision of the Supreme Court of New Jersey, denying their right to recapture from New Jersey any taxes paid by them under the Emergency Transportation Tax Act.* In asserting this claim for relief petitioners proceed upon the theory that once *Austin* v. *New Hampshire* was decided, the invalidity of the ETT was incontrovertible and New Jersey could not in good faith have collected or defended the validity of the tax. They therefore conclude that the Supreme Court of New Jersey erred in finding the State's reliance upon the constitutionality of the

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* The claims of the petitioners in total are in excess of $25,000. Identical claims for relief for all ETT monies collected by the State have also been sought in a pending and as yet uncertified class action suit filed on April 14, 1978 in the Superior Court of New Jersey, Chancery Division, (*Yowell* v. *Glaser*) (Docket No. C-2190-77), which has been stayed pending a final determination in this action (App. A at 16a). Additionally, there are pending within the New Jersey Division of Taxation an undetermined number of claims for refunds of ETT and in the Tax Court of New Jersey ten suits appealing the denial of ETT refund claims. The potential recovery under all these claims amounts to approximately $500 million—a significant percentage of the State's $6.1 billion budget (see P.L. 1982 c. 49 at 482). If limited to the amounts collected from the date of the *Austin* v. *New Hampshire* ruling, the refund sought would be in excess of $260 million, the loss of which have would a devastating effect on the State's fisc (see Supplemental Brief of Respondents, Supreme Court of New Jersey at pp. 6-7).

tax justifiable and a factor thus warranting prospective invalidation of the tax alone. Such a theory of mandatory retrospective invalidity is predicated upon a fundamental misconception of the applicable law and ignores as well the compelling equitable factors which justify the denial of any monetary recovery from New Jersey.

While this Court initially espoused the common law doctrine that an invalidated statute must be deemed a nullity from the moment of its adoption (". . . in legal contemplation as inoperative as though it had never been passed" *Norton* v. *Shelton County*, 118 U.S. 425, 442 (1886)), the rigidity of the rule and the impractical and harsh results which it compelled in invalidating all past transactions made in reliance upon a purportedly legitimate statute led the Court in *Chicot Co. Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940), to reason that the "broad statements" of absolute retrospective invalidity espoused in *Norton* were unjustified:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

The deathknell of the *Norton* doctrine was sounded in *Lemon* v. *Kurtzman*, 411 U.S. 192, 199 (1973) (*Lemon* II).* There Chief Justice Burger, in the plurality opinion of the Court, concluded that the Court's abandonment of the doctrine was compelled by the "recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." Where the government's evaluation of the constitutionality of a legislative enactment is made in good faith and is reaffirmed upon initial judicial review, *Lemon* II instructs that the expenditure of public monies pursuant to the later invalidated statute should not be overturned. *Id.* at 207-209.

In so ruling the Court rejected the position of the plaintiffs that the Court's 1971 invalidation of a Pennsylvania statutory program to reimburse nonpublic sectarian schools

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* The implicit rejection of the *Norton* doctrine and concomitant adoption of an equitable analysis in determining questions as to the appropriateness of retroactive invalidation of challenged statutes was evident in several decisions issued prior to *Lemon*. See *Allen* v. *Bd. Elections*, 393 U.S. 544 (1969) (State's failure to obtain federal approval of composition of election districts pursuant to section 5 of the Voting Rights Act did not require invalidation of prior elections); *Cipriano* v. *Houma*, 395 U.S. 701 (1969) (invalidation of Louisiana law permitting property owners alone to vote in election to approve the issuance of municipal utility revenue bonds did not compel invalidation of previous approval of $10 million in bonds in view of the "significant hardships" which would befall the cities, bondholders and other persons connected with the utilities if the bonds were invalidated); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970) (invalidation of $60,450,000 in general obligation bonds approved pursuant to an unconstitutional election process not required since bonds were issued on the "good faith assumption that restriction of the franchise in the bond election was not constitutionally prohibited [and because] it would be unjustifiably disruptive" to give the decision full retroactive effect.)

for certain secular educational services (*Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (*Lemon* I)) precluded the subsequent District Court order on remand permitting the State to reimburse nonpublic sectarian schools approximately $24 million owed for services provided during the 1970-1971 school year before issuance of the *Lemon* I decision.* Recognizing that where as in the present case an equitable solution was required, the Court determined that "reliance interests must weigh heavily in the shaping" of the appropriate equitable decree. In *Lemon* II the Court concluded that the plaintiffs' "tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments [in entering into new contracts] in reliance upon reimbursement by the State . . ." *Id.* at 204. Nor was such reliance undercut by the fact that the statute's validity had never been authoritatively determined. In soundly rejecting this proposition, the Chief Justice stated:

> Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is consti-

* The challenged law was enacted on June 19, 1968 and contracts with nonpublic schools were entered into in January 1969. Within one month of adoption of the legislation plaintiffs publicly announced their intention to file a lawsuit challenging its constitutionality. Simultaneously with the filing of their complaint on June 3, 1969 plaintiffs sought a preliminary injunction to restrain responsible state officials from paying or processing for payment any funds appropriated pursuant to the challenged legislation. This motion however was subsequently withdrawn by plaintiffs. Following the District Court's dismissal of the complaint and the Court's acceptance of their appeal, plaintiffs did not move for interlocutory relief pending appeal.

tutional. Appellants would have state officials stay their hands until newly enacted state programs are "ratified" by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers—the officers of Pennsylvania—have the power to carry forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review. We do not engage lightly in post hoc evaluation of such political judgment, founded as it is on "one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law." *San Antonio School District* v. *Rodriguez,* 411 U.S. at 60 (Stewart, J., concurring).

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In short, the propriety of the relief afforded appellants by the District Court, applying familiar equitable principles, must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful [*Id.* at 207-209].

In considering claims for recovery of taxes paid prior to invalidation of governing tax statutes, reviewing courts have followed or anticipated the *Lemon* II analysis in barring restitution of tax monies collected by governmental officials in good faith reliance upon the presumed validity of the tax enactments. Thus in *District of Columbia* v. *Keyes*, 362 A.2d 729 (D.C. Ct. App. 1976), the court denied a request that the District be required to refund all excess taxes for the 1973 fiscal year (variously estimated to be $1.1-1.75 million) collected pursuant to a statute declared unconstitutional in October, 1973. Given the significant monies involved (as compared to the District's annual $1 billion budget), the fact that the funds had already been expended for governmental purposes and that new taxes or decreased public services would be effected if the recovery was allowed, the Court concluded that equity had been done in the prior proceeding with the issuance of a mandatory injunction prohibiting the District's use of the invalidated assessment procedure for the 1974 fiscal year.

Similarly in *Hurd* v. *City of Buffalo*, 343 N.Y.S.2d 950 (Sup.Ct. App. Div. 1973) aff'd 355 N.Y.S.2d 369, 311 N.E. 2d at 504 (Ct. App. 1974), the New York courts refused to apply their decision as to the unconstitutionality of a tax statute retrospectively to allow for recovery of excess taxes. Finding the equitable considerations of reliance cited in *Lemon II* to be dispositive, the courts concluded that the City's reliance on its ability to collect the taxes pursuant to the statute in preparing its budget and its expenditure of these monies was a sound basis upon which to deny recovery of the "illegally collected" taxes.* See also *Heller-*

* In *Pellnat* v. *City of Buffalo*, 399 N.Y.S.2d 788, 790 (Sup. Ct. App. Div. 1977) the Court extended the *Hurd* decision to preclude recovery of taxes paid under protest after the *Hurd* trial court's

(Footnote continued on following page)

stein v. *Assessor*, 37 N.Y.2d 1, 14, 332 N.E.2d 279, 287 (Ct. App. 1975) mod. 39 N.Y.2d 920, 352 N.E.2d 593 (Ct. App. 1976) (decision invalidating illegal assessment practices of Town of Islip held to be prospective only with the effective date of the order deferred until July 1, 1978 in order to provide for reasonable time for reassessments; in dictum, the court opined that taxes levied and paid should not be recoverable). See also *Deltona Corp.* v. *Bailey*, 336 So. 2d 1163, 1166 (S.Ct. Fla. 1976) and *Interlachen Lakes Estates, Inc.* v. *Snyder*, 304 So.2d 433, 326-327 (S.Ct. Fla.

(Footnote continued from preceding page)

decision upholding the challenged statute had been reversed by the Appellate Division decision but before affirmance of the Appellate Division decision by the Court of Appeals, concluding that the City of Buffalo had the right to rely on the basic presumption of the constitutional validity of the law despite the Appellate Division determination since "there was no certainty as to the ultimate determination of the question . . . [and] practicality demanded that the governmental process go on." In the wake of subsequent efforts by the New York Legislature to re-enact statutes "indistinguishable from the Legislation struck down as unconstitutional in *Hurd supra*," the Court of Appeals however did allow for restitution of any taxes paid in protest by the taxpayers who initiated lawsuits to invalidate these enactments on the basis that its opinion in *Hurd* put local subdivisions on notice that "patent circumvention of constitutional limitations on their taxing powers would not be tolerated." *Bethlehem Steel Corp.* v. *Bd. of Ed.*, 402 N.Y.S.2d 655 (Sup. Ct. App. Div. 1978) aff'd and mod. 406 N.Y.S.2d 752, 755 (Ct. App. 1978). See also *Central Buffalo Project* v. *City of Buffalo*, 428 N.Y.S.2d 102 (Sup. Ct. App. Div. 1980) aff'd o.b. 438 N.Y.S.2d 79 (Ct. App. 1981). A similar state court ruling authorizing recovery of past taxes paid pursuant to the unconstitutional applications of the taxing laws was also predicated upon the implicit finding of unjustified or bad faith assessment. See *Florida Dept. of Revenue* v. *Ford*, 417 So.2d 1109 (D. Ct. App. Fla. 1982) (failure of State Department of Revenue to even attempt to undertake its statutory duty to supervise the assessment of valuation of property).

1973) (invalidation of statute establishing unconstitutional tax assessment valuation scheme prospective only from date opinion on rehearing issued); *Gulesian* v. *Dade County School Bd.*, 281 So.2d 325, 326-327 (S.Ct. Fla. 1973) (refund of $7.3 million in taxes illegally collected without elector approval denied); *Deseret & Ranches of Fla.* v. *St. Johns River Water Management District*, 406 So.2d 1132 (Dist. Ct. App. Fla. 1981) (refund of ad valorem taxes collected by an unconstitutionally created water management district denied). See also *Wilson* v. *School District of Philadelphia*, 328 Pa. 225, 195 A. 90, 100-101 (S.Ct. 1937) (taxes levied by Philadelphia school district pursuant to unconstitutional statutory provision not recoverable; as well, delinquent taxpayers could be assessed for taxes unpaid during the period prior to invalidation of the statute where school district had incurred expenses in reliance on such future payments).

In the wake of these rulings as well as its own earlier pronouncements, see e.g. *Borough of Neptune City* v. *Borough of Avon by the Sea*, 61 N.J. 296, 294 A.2d 47 (1972), *Darrow* v. *Hanover Tp.*, 58 N.J. 410, 412, 278 A.2d 200 (1971), *Goldberg* v. *Traver*, 52 N.J. 344, 245 A.2d 334 (1968) and *Switz* v. *Middletown Tp.*, 23 N.J. 580, 130 A.2d 15 (1957), it is evident that the Supreme Court of New Jersey, in framing the relief to be granted to petitioners herein, was not compelled by either the State or Federal Constitutions to invalidate retrospectively the State's collection of taxes during the 22 years in which the ETT legislation has been in effect. Rather, that court possessed "a large measure of . . . discretion . . . in deciding both the issues of prospective application or retrospective application and the time for which the new principle is to be deemed controlling." *State* v. *Vigliano*, 50 N.J. 51, 65-66, 232 A.2d 129 (1967) cited with approval in *Jenkins* v. *Delaware*, 395 U.S. 213, 218 (1969).

As recognized in *Lemon II, supra* at 200, 201

> . . . in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair and what is workable. . . . In equity, as nowhere else, courts [must] eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that these interests have constitutional roots.

Accordingly (and petitioners herein do not dispute this), in the exercise of its equitable discretion the Supreme Court of New Jersey properly considered and gave great weight in determining the appropriate form of relief to be afforded petitioners to such pragmatic and compelling factors as: the absence of any attempt by petitioners or other commuters to obtain interim injunctive relief during the pendency of this action "presumably because their right to relief was not clear. . . ." (App. A at 18a to 19a); the fact that petitioners have suffered no financial harm by operation of the ETT in that they have received full credit for the amounts paid to New Jersey against their New York income tax (App. A at 19a); and the fiscal chaos which would result if full refunds were compelled** (App. A at

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* The individual taxpayers accordingly have no entitlement in equity to obtain the monies sought and would reap only a windfall if the requested relief were granted. *See United States* v. *Jefferson Electric Co.*, 291 U.S. 386, 402-03 (1934).

** This Court, of course, in various contexts has recognized the substantial degree to which States rely on tax revenues and the "ominous . . . potential for havoc" that the enjoining of the State collection process and even temporary loss of tax revenues will effect. *See Fair Assessment in Real Estate Assoc., Inc.* v. *McNary*, 454 U.S. 100, 103 (1981); *Rosewall* v. *LaSalle National Bank*, 450 U.S. 503, 527, 528 (1981).

18a). Indeed, petitioners' sole basis for challenge is their claim that the court below erred in declining to rule that the ETT is indistinguishable from the tax invalidated in *Austin* v. *New Hampshire* and thus that New Jersey could not reasonably have concluded that the tax would ultimately be validated. The fallaciousness of this assertion is evident.

Of obvious and critical distinction are the trial court and the Supreme Court of New Jersey's findings of the unique demographic and commuter transportation problems experienced in the metropolitan New York-New Jersey area and the contributing factor the New York commuters play in increasing the need for substantial expenditures by the State of New Jersey for maintenance and subsidy of interstate transportation facilities. In response to these problems and in recognition of the absence of any contribution by New Yorkers to the inordinate costs incurred by New Jersey, the State of New Jersey, with the concurrence of the State of New York, as evidenced by the 1962 Accord concluded by Governors Rockefeller and Hughes, undertook to tax New York commuters alone under the ETT with the understanding that these New Yorkers would be afforded a credit for payment of these taxes against the New York tax, and with the further agreement that a reciprocal taxing arrangement would be established for the New Jersey traveler. In short, the ETT and the tax credit mechanisms of the two States became the mechanisms for achieving what both States perceived as an equitable apportionment of taxes levied on the total class (citizens of New Jersey and New York) of interstate commuters involved. In reliance on the terms of the Accord, and specifically, the agreement "that neither State would contest nor participate in contesting the right of the other to levy and collect the taxes imposed by the two laws on residents of the other . . ." (Cr. Pet. App. C at 67a), New Jersey

reasonably believed that a reciprocal arrangement to fairly allocate the financial burdens of government between the States had been achieved consistent with the limitations imposed by the Privileges and Immunities Clause.

The issuance of the *Austin* v. *New Hampshire* ruling did not and should not have dispelled the State's firm belief in the legitimacy of the ETT. Thus, rather than altering the principles governing challenges to State tax legislation under the Privileges and Immunities Clause of Article IV of the United States Constitution, the Court re-emphasized the fact that this Clause ". . . implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." *Id. at* 662. The Court also quoted with approval the statement in *Travelers' Insurance Co.* v. *Connecticut,* 185 U.S. 364 (1901) that to satisfy the requirements of the Clause it is "enough that the State has secured a reasonably fair distribution of burdens and that no intentional discrimination has been made against nonresidents." 420 U.S. at 664. However, the record in *Austin* was barren of any indication that the tax "secured a reasonably fair distribution of burdens." Moreover, there was no suggestion in the record that nonresidents imposed any special fiscal burden on the State nor that the proceeds from the taxes imposed on nonresidents were devoted to meeting that burden, as was the case in New Jersey. Most significantly, there was no indication that the invalidated tax had resulted from bilateral actions between sister states as with the New York-New Jersey accord. In fact, the Court specifically noted that:

> Neither *Travis* nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a dis-

> advantage upon nonresidents, not reciprocally favorable treatment of nonresidents by states that coordinate their tax laws [*Id.* at 667, n. 12].*

The State's good faith belief that the ETT would survive any constitutional challenge was confirmed by the initial trial court ruling that New York and New Jersey had entered into a reciprocal agreement, consistent with the principles of interstate comity embodied in the Privileges and Immunities Clause of Article IV, pursuant to which the States had sanctioned their respective Legislature's formulas for the taxation of residents and nonresidents. Although this ruling was ultimately vacated by the Supreme Court of New Jersey in its 1980 ruling, the State was successful in its contentions that the mere superficial similarity between the New Hampshire tax in-

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* In this regard petitioners blatantly misrepresent the legal arguments of the State of New Jersey in the *amicus curiae* brief filed in *Austin* v. *New Hampshire*. A review of the *entire* paragraph in the *amicus* brief from its beginning (not from the middle as in petitioners' brief), reveals the State's true position, i.e., only the collection of the two taxes from non-residents is similar—in all other respects the taxes *differ*:

> *The transportation taxes imposed by New Jersey thus differ from the New Hampshire income tax involved in the present matter since the revenues from the New Jersey taxes are used solely to alleviate transportation problems encountered by the interstate commuters while the New Hampshire tax revenues are not so dedicated.* Also, each of the New Jersey taxes has a uniform tax rate. Nevertheless, the New Jersey and New Hampshire taxes are similar insofar as the tax revenues are derived solely from nonresidents because each of the taxing statutes permit residents a credit for income taxes paid to the State wherein such persons work [*Amicus Curiae* brief of the Attorney General of New Jersey in *Austin* v. *New Hampshire*, page 3; emphasis added].

validated in *Austin* and the ETT would not justify automatic invalidation of the ETT without further inquiry as required by *Hicklin* v. *Orbeck* and *Toomer* v. *Witsell* as to the peculiar burden which New York commuters imposed on the New Jersey transportation network, the expenditures required by the New York commuters' use of the State's transportation system and the use of the proceeds from the ETT to meet those burdens. As well, the State prevailed in its arguments that the ETT legislation did not place an impermissible burden on New Yorkers' right to travel or otherwise violate the prohibitions of the Equal Protection Clause. These rulings, of course, were not placed in doubt when this Court on October 6, 1980, dismissed petitioners' appeal. That New Jersey reasonably persisted in its belief in the legitimacy of the ETT and in its entitlement to collect and utilize these monies was reaffirmed with the issuance of the trial court opinion on remand that the ETT did not violate the Privileges and Immunities Clause.*

Each of these affirmative preliminary rulings by the reviewing courts as well as the substantial arguments the State continues to press in its cross-petition for a writ of certiorari in this action obviously justified a conclusion

* The State's reliance upon the availability of ETT funds and its right to expend same for necessary transportation costs has equally been enforced by the absence of any challenge made to its constitutionality from 1962-1976, and thereafter by the *Salorio* and *Yowell* plaintiffs' tactical decisions not to seek interim injunctive suspension of the tax or creation of a fund in court in which the tax monies could be deposited during the pendency of these proceedings. As the *Lemon* II Court repeatedly emphasized, *id.* at 204-205, such a tactical choice may reasonably "encourage" the governmental or private body "to incur detriments in reliance upon" the availability of these monies.

by the court below which should be affirmed by this Court that the State has proceeded in good faith in its belief that the ETT is not "plainly unlawful." *Lemon II, supra* at 209.

Balanced against the substantial equitable factors militating in favor of prospective application of an adverse ruling—the devastating monetary exposure faced by the State, the State's good faith judgment as to the constitutionality of the ETT legislation and its reliance on and expenditure of the taxes collected—is the uncontroverted absence of any cognizable harm to the petitioners in this proceeding or to New York commuters generally. Moreover, because it is undisputed that this case is being totally financed by New York State and from the limited discovery permitted the State it appears that the litigation may also have been completely controlled by the State, there is no warrant for concern that denial of retrospective relief would deny to these petitioners a reward for their initiative in pursuing the litigation.* Compare e.g. *Ramirez* v. *Amsted Industries, Inc.*, 86 N.J. 332, 357, 431 A.2d 811 (1981); *Willis* v. *Dept. of Cons. & Ec. Dev.*, 55 N.J. 534, 541, 264 A.2d 34 (1970). Accordingly, under the clear guidelines articulated by the Court in *Lemon II*, the Supreme Court of New Jersey's denial of the requested refund of ETT was an eminently proper exercise of the broad discretionary powers afforded the State courts in fashioning equitable remedies. *Cf.* also *Los Angeles Dept. of Water and*

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* As noted in the cross petition these actions by New York are in violation of certain provisions of the Accord between the two States. New York, however, is not a named party to this litigation and no issue consequently is presented herein as to the enforceability of this part of the Accord or remedies available for its breach. Except as to its pledge not to "contest" the ETT, New York has otherwise abided by the terms of the Accord.

Power v. *Manhart*, 435 U.S. 702, 719-723 (1978). For these same reasons and in proper recognition of the burdensome task imposed upon the New Jersey Legislature to establish an alternative scheme of taxation to replace the millions of dollars of tax revenue to be lost with the invalidation of the ETT and the evidence establishing the validity of approximately 50% of the ETT rate, the Supreme Court of New Jersey properly postponed the effective date of its decision until January 1, 1984. See *Northern Pipeline Co.* v. *Marathon Pipeline*, —— U.S. —— (1982) and —— U.S. —— (1982); *Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976).

The determinations of the Supreme Court of New Jersey challenged herein therefore reaffirm this Court's and Congress' confidence in the competency of the State judiciary to adjudicate and safeguard federal constitutional rights. *Dist. Col. Court of Appeals* v. *Feldman*, —— U.S. ——, n. 16 (1983); *Calif.* v. *Grace Brethren Church*, —— U.S. —— (1983); *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, —— U.S. —— (1982). In strict adherence to the Court's rulings on factors to be weighed in determining the retrospectivity of constitutional adjudications affecting the public fisc, the court below balanced the relative harm to the State, innocent third parties and the individual claimants and evaluated the reasonableness of the State's conviction that invalidation of the ETT was not "clearly foreshadowed" by the *Austin* ruling. See *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971). Petitioners' protestations to the contrary as to this latter point ignores the critical distinctions between the two taxes established by the evidence adduced below, but of equal importance fails to take cognizance of the Court's admonitions that in litigation involving issues respecting the constitutionality of state taxes "opinions must be read in the setting of the particular cases and as the product of preoccupation with

their special facts." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946).

The petition for writ of certiorari plainly does not present any question of constitutional dimension nor any other basis which would warrant the granting of such extraordinary relief. The petition should therefore be denied.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: October 6, 1983

Respectfully submitted,

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Respondent, Sidney Glaser, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,
By: MICHAEL R. COLE,
Assistant Attorney General.

MICHAEL R. COLE,
Assistant Attorney General,
Of Counsel.

MARY R. HAMILL,
ANDREA M. SILKOWITZ
Deputy Attorneys General,
On the Brief.

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No. 83-353

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN SALORIO, ROBERT COE and
JOHN D. MCGARR, JR.,

Petitioners,

—v.—

SIDNEY GLASER, Director of the Division of Taxation,
Department of the Treasury of the State of New Jersey,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Max Gitter,
345 Park Avenue
New York, New York 10154
(212) 644-8000

Adrian M. Foley, Jr.,
Gateway I
Newark, New Jersey 07102
(201) 643-2060

Counsel for Petitioners

Of Counsel:

Richard A. Rosen,
Paul, Weiss, Rifkind,
Wharton & Garrison
A partnership including
professional corporations
New York, New York

Kevin J. Coakley,
Connell Foley & Geiser
Newark, New Jersey

November 7, 1983

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IN THE

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JOHN SALORIO, ROBERT COE and
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SIDNEY GLASER, Director of the Division of Taxation,
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ON PETITION FOR WRIT OF CERTIORARI
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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

I

THIS COURT SHOULD GRANT REVIEW TO REINFORCE THE PRINCIPLE THAT THE LOWER COURTS DO NOT HAVE UNTRAMMELED EQUITABLE DISCRETION TO DENY RETROACTIVE APPLICATION TO THEIR DECISIONS

Respondent seeks to dissuade this Court from granting certiorari by arguing that the New Jersey Supreme Court merely exercised its broad discretion, engaging in an equitable balancing of multifarious factors, in concluding that New Yorkers were not entitled to refunds of sums collected under the unconstitutional Commuter Income Tax. But it is precisely *because* the New Jersey Supreme Court decided the retroactivity question in this case as though relief were a matter solely within its equitable discretion that this Court should grant

certiorari. Where, as here, the ruling declaring a statute unconstitutional was "clearly foreshadowed"—indeed, compelled—by a prior ruling of this Court, there is no room for equitable balancing. Any other approach would, as we stressed in our petition for certiorari, undermine the principle of *stare decisis* while simultaneously insulating lower court rulings from meaningful judicial review.

It has long been axiomatic that

> "[a]n issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the decision overrules clear past precedent, . . . or disrupts a practice long accepted and widely relied upon."

Milton v. *Wainwright*, 407 U.S. 371, 381-82 n.2 (1972) (Stewart, J., dissenting on other grounds). *Accord*, *e.g.*, *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971) ("First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968) (decision is retroactive unless it represents "a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks"); *Lee* v. *Missouri*, 439 U.S. 461, 462 (1979) (unless Court establishes " 'new standards' of constitutional law not evident" from prior decisions, the considerations that have led the Court "in other cases to depart from full retroactive application of constitutional holdings . . . are inapplicable").

As a matter of both logic and constitutional policy, the justification for a rule of presumptive retrospectivity[1] is unas-

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1 *See, e.g., Valencia* v. *Anderson Bros. Ford*, 617 F.2d 1278, 1288 (7th Cir. 1980), *rev'd on other grounds*, 452 U.S. 205 (1981); *Cash* v. *Califano*, 621 F.2d 626, 628 (4th Cir. 1980); *Kremer* v. *Chemical Const. Corp.*, 623 F.2d 786, 788-89 (2d Cir. 1980) (Friendly, J.), *aff'd on other grounds*, 456 U.S. 461 (1982).

sailable. If judicial decisions were held to have no application beyond the facts and parties directly involved, the rule of *stare decisis* would dissolve into a welter of particularistic case dispositions. "Balancing," as Judge Friendly has pointed out, would be required in every case. *Kremer, supra*, 623 F.2d at 789. Because judicial opinions have the force of law and are designed to be a guide to future conduct, a decision is applied retroactively if it simply restates existing law, or extends the law to apply to a new fact situation forseeably within the ambit of precedent. No different rule applies when the consequence of retroactivity is that a state must pay damages for transgressing such settled law.[2]

In light of this standard, respondent's contention that the decision below is not worthy of review by this Court is untenable. The New Jersey Supreme Court was plainly wrong to conclude that, as a matter of its equitable discretion, it had the power to defer the effectiveness of its decision invalidating the Commuter Income Tax until 1984, and to decline to award refunds of taxes collected under the unconstitutional statute. Indeed, the Court appears to have indulged in a *presumption* that its decision should be prospective only. Far from representing a radical shift in the interpretation of the Privileges and Immunities Clause, however, *Salorio* followed inexorably from, and was compelled by, this Court's decision in *Austin*. (*See* Petition for Certiorari at pp. 3-7 and pp. 5-9, *infra*.)

By relying on a congerie of factors of varying significance, ranging from the notion that *all* statutes are presumptively valid (a presumption clearly negated, in any case, by the New Jersey Court's 1980 ruling), to the effects of a "reciprocal arrangement" between New York and New Jersey (which the Court below had itself discredited in 1980 as a basis for the

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2 Among lower court decisions that have followed these principles by applying constitutional rulings retroactively and awarding damages against either the states or the federal treasury, *see, e.g., Cash, supra*, 621 F.2d at 630; *National Ass'n of Broadcasters* v. *F.C.C.*, 554 F.2d 1118 (D.C. Cir. 1976); *Hurvich* v. *Califano*, 457 F. Supp. 760, 762 (N.D. Cal. 1978); *Bethlehem Steel Corp.* v. *Board of Education*, 406 N.Y.S.2d 752, 755 (Ct. App. 1978); *Florida Dep't of Revenue* v. *Ford*, 417 So. 2d 1109 (Fla. App. 1982).

respondent's position),[3] to the State's reliance on the tax revenues in making appropriations, the Court below fashioned a "balancing test" where none was appropriate.

But the significance for *this* Court of the decision below extends well beyond the confines of a bad result in a particular case. Whatever the validity of the balancing approach in fashioning injunctive or other equitable relief where the rule of constitutional law announced is truly one of first impression, *see, e.g., Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), it can have no application when taxpayers seek refunds of taxes paid under a statute that was plainly unconstitutional under controlling law. The substitution of discretionary, ad hoc balancing tests for adherence to precedent as a basis for determining whether constitutional decisions should be afforded retrospective effect directly undermines *stare decisis*.

And such an approach carries with it other, subtler dangers as well. First, in the absence of assurance that damages will be awarded unless the constitutional ruling "marks a sharp break in the web of the law," *Milton*, *supra*, 407 U.S. at 381 n.2, state legislatures will have no incentive to comply in advance with constitutional norms, but will "gamble" as New Jersey did here.

Second, the corollary of indiscriminate application of a balancing test is that judicial review of such "discretionary" decisions would only be available in what respondent terms "extraordinary" circumstances. Simultaneously broadening the scope of discretion of the trial courts and narrowing the availability of meaningful appellate review of retroactivity rulings may, in itself, weaken the precedential effect and enforceability of this Court's rulings. Such a standard is particularly troubling in the context of challenges, such as this one, to the constitutionality of state tax statutes, which can only be litigated in the state courts. *See* Tax Injunction Act, 28 U.S.C. § 1341 (1976).

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3 *See Salorio* v. *Glaser*, 414 A.2d 943, 956-58 (S. Ct.), *cert. denied*, 449 U.S. 879 (1980). *See also* Cross Respondents' Brief in Opposition to the Cross Petition for A Writ of Certiorari, filed simultaneously herewith, at 3-4, 7-12.

II

THE COMMUTER INCOME TAX IS INDISTINGUISHABLE FROM THE TAX INVALIDATED IN *AUSTIN*, AND RESPONDENT HAD NO REASONABLE BASIS FOR RELYING ON A PRESUMPTION OF ITS CONSTITUTIONALITY.

Respondent urges that he reasonably relied on the presumptive constitutionality of the Commuter Income Tax in collecting revenues from New Yorkers, and that, in any event, the "unique" transportation problems that the tax was designed to address distinguish it from the structurally identical tax invalidated in *Austin*. The record is all to the contrary; there was no basis for denying retroactive effect to the New Jersey Supreme Court's decision.

First, it is worth emphasizing that respondent did *not* rely on any pre-*Salorio* case law suggesting that the Commuter Income Tax was constitutional. Thus, unlike decisions in which this Court has directed that only prospective relief be awarded, *Salorio* neither overruled a prior decision nor invalidated a long-standing practice of unquestioned legitimacy. *Brown* v. *Louisiana*, 447 U.S. 323, 335 (1980). To the contrary, this Court's ruling in *Austin* (in which New Jersey submitted an *amicus* brief in support of the New Hampshire tax) made it clear that the New Jersey tax was constitutionally very vulnerable, to say the least. If any doubt remained, it was erased by the New Jersey Supreme Court in 1980, when it held that the tax could not be sustained on the record before it because the respondent had failed to carry his burden of proving that "non-residents are taxed only to the extent of their contribution to the transportation problem." 414 A.2d at 955-56.

Where, as here, New Jersey has been on notice since 1976 that the statute was under serious challenge, and that the consequences of its being declared unconstitutional could include the payment of refunds on a class-wide basis to affected New Yorkers, there can be no unfair surprise in ordering that refunds be paid from 1976, after *Austin* was decided—especially since respondent segregated Commuter Income Tax reve-

nues for several years after *Austin*, in recognition of its implications for the viability of the tax. *See National Ass'n of Broadcasters*, *supra*, 554 F.2d at 1132.[4]

Nor can respondent plausibly claim that, in contrast to *Austin*, New Jersey was faced with costs imposed on it by New York commuters. First, this distinction is meaningless as a matter of law. By definition, a nonresident who works in a neighboring state and thereby earns income can do so only by transporting himself there, necessarily imposing some cost or burden on the neighboring state. But *Austin* presented precisely this issue, and therefore must be read to hold that the "transportation problem" created by the mere movement of residents of one state to work in a neighboring state cannot justify a discriminatory tax. There is even less justification for such a tax where, as here, the prior history of the tax demonstrates that it was designed purely as a measure to divert revenue to New Jersey from New York, and that changes in rates have invariably been tied, not to transportation exigencies, but to New York's tax code. (Petition for Certiorari at 5.)[5]

Second, as even respondent concedes, the number of New York residents who commute to New Jersey is "substantially smaller" than that of their New Jersey counterparts. New Yorkers, of course, are therefore travelling *against* the peak flow of traffic at all peak hours. As a matter of both logic and

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4 Respondent makes much of the fact that petitioners did not apply for interim injunctive relief against enforcement of the statute. But in contrast to *Lemon*, *supra*, 411 U.S. 192, in which the ongoing harm to petitioners consisted of an entanglement between church and state not remediable through money damages, a motion for a preliminary injunction in *Salorio* clearly would have been met with the argument that, in the event the statute were ultimately declared unconstitutional, damages would provide full relief—the most traditional ground for denial of a preliminary injunction.

5 Respondent's contention that the "most significant" difference between this case and *Austin* is the existence of a joint press release issued by the Governors of New York and New Jersey in 1962, and dubbed an "interstate agreement" by respondent, is dealt with in detail in Cross Respondents' Brief in Opposition to the Cross Petition for Certiorari, filed simultaneously herewith.

fact proven below, then, the vast preponderance of commuter transportation expenses cannot be attributable to New Yorkers travelling to New Jersey, but to New Jersey's own residents, who would need precisely the same facilities even if *no* New Yorkers commuted across the river.[6]

Third, as the New Jersey Supreme Court found, the revenues from the Commuter Income Tax have been used to subsidize a "very substantial portion" of state expenditures for *intra-state* transportation facilities that are rarely used by New Yorkers. 414 A.2d at 954 & n.22. Under these circumstances, it can hardly be urged that the Commuter Income Tax was a carefully tailored response to the "peculiar burdens" supposedly imposed on New Jersey transportation facilities by New Yorkers. *See, e.g., Hicklin* v. *Orbeck*, 437 U.S. 518, 526-27 (1978).

But the statistics in the record bear out even more clearly what common sense tells us must be so. Thus, New Yorkers account—at most—for only 1% of the total usage of transportation facilities in Northern New Jersey.[7] And the record evidence demonstrated that any costs occasioned by such usage was more than defrayed by payments by New York commuters of New Jersey's gasoline tax alone. In the face of this evidence (and despite statements in respondent's brief to the contrary) *neither* respondent's experts, *nor* the trial judge, *nor* the New Jersey Supreme Court, concluded that New Yorkers were a peculiar source of any transportation problem or that they "substantially exacerbated" it. At best, one of respondent's experts, having conceded that the "extraordinary commutation

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6 Astonishingly, respondent and his experts have taken the position that in assessing the incremental costs New Yorkers impose on New Jersey transportation facilities, it is *irrelevant* that they travel against the peak flow of traffic at peak hours (Petitioner's Appendix at A35).

7 A good example of respondent's whimsical way with statistical evidence is found in his brief in opposition to the petition for certiorari in this Court (at 3), in which he states that over *7 million* persons cross the Hudson River each day between New York and New Jersey. In fact, this number represents the total number of persons who travel from home to work in the entire New York-New Jersey metropolitan area (A32).

problem" was caused by vast numbers of New Jerseyans commuting to New York, could only conclude lamely:

> "I determined that the New York commuter is part of the transportation problem which is entirely a problem of commuter overload. *Any* increment that adds to that, adds to the overload."

Nor did the Court below adopt as a factual finding the contention that the costs attributable to New York commuters amounted to $182 million annually, as respondent repeatedly iterates. The Court stated that it need not resolve petitioners' challenge to "nearly every element" of respondent's allocation of expenditures, because it concluded that "*even if* these allocation charges are not overstated," the Commuter Income Tax revenues, which were *indisputably twice* that sum, did not bear a substantial relationship to the burdens imposed by New Yorkers on the transportation system (Petitioners' Appendix at A14) (emphasis supplied).[8]

Significantly, the Court below did *not* conclude that respondent could reasonably have relied on a belief that the Commuter Income Tax was adapted to a peculiar transportation problem caused by New Yorkers. Instead, the Court simply pointed to the presumptive constitutionality of *all* legislation, and went on to note that state officials relied on the *income* from the tax in making budgets, appropriations and expenditures (Petitioners' Appendix at A18). In short, New Jersey officials, far from relying on any genuine "fit" between tax revenues exacted from New Yorkers and New Jersey's

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8 Given the absurdities in the methods and evidence used by respondent to arrive at the $182 million figure, it would have been surprising indeed if the Court below had accepted it. Thus, for example, the cost allocation presented by one of respondent's experts concluded that New York commuters account for *twenty times* the costs posited by respondent's other expert. (This same expert assumed that, but for commuters, virtually *no* new roads would have been built or improved in New Jersey since 1960, and that a passenger car causes precisely the same damage to a road as a fully loaded truck—testimony that the trial court flatly rejected.)

transportation costs,[9] simply took a gamble that the Commuter Income Tax would be upheld, or that, if invalidated, no refunds would be awarded. Such a gamble is not entitled to the solicitude evinced by the Court below.[10]

Ultimately, respondent's argument, and the decision of the Court below, boils down to the proposition that the money involved here has already been spent by the State of New Jersey, and that any award of damages would have an impact (amounting, at most, to 4% of one year's budget) on the State's fisc. But, obviously, this argument proves far too much.[11] If accepted here, in the face of the clear ruling from this Court in *Austin* striking down an identical tax, and in the absence of any justifiable reliance by respondent, it is hard to see under what circumstances such relief could ever be awarded.

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9 In this connection, it is striking that respondent's cross petition, which seeks review of the decision below to the extent that it invalidated the Commuter Income Tax, abandons entirely any argument that the tax is constitutional because it meets transportation costs. Indeed, the only arguments raised in the cross petition are those that were *rejected* by the New Jersey Supreme Court in 1980. *See* Cross Respondents' Brief in Opposition to the Cross Petition for Certiorari, filed simultaneously herewith.

10 That respondent's gamble was an unreasonable one was immediately evident to at least one interested observer, the Governor of Connecticut. After the trial court sustained the constitutionality of the tax in 1982, the Connecticut legislature passed a comparable commuter income tax. Governor O'Neill vetoed it, declaring (in a letter that is part of the record below) that the tax was clearly unconstitutional under *Austin*, and that Judge Petrella's ruling would ultimately be overturned on appeal.

11 *See Cash*, *supra*, 621 F.2d at 632 ("A financial impact alone is an insufficient basis to mandate nonretroactivity").

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the prospective aspect of the judgment of the Supreme Court of New Jersey.

November 7, 1983

Respectfully submitted,

Max Gitter
Adrian M. Foley, Jr.
Counsel for Petitioners

Of Counsel:

Richard A. Rosen
Kevin J. Coakley